



This is a digital copy of a book that was preserved for generations on library shelves before it was carefully scanned by Google as part of a project to make the world's books discoverable online.

It has survived long enough for the copyright to expire and the book to enter the public domain. A public domain book is one that was never subject to copyright or whose legal copyright term has expired. Whether a book is in the public domain may vary country to country. Public domain books are our gateways to the past, representing a wealth of history, culture and knowledge that's often difficult to discover.

Marks, notations and other marginalia present in the original volume will appear in this file - a reminder of this book's long journey from the publisher to a library and finally to you.

Usage guidelines

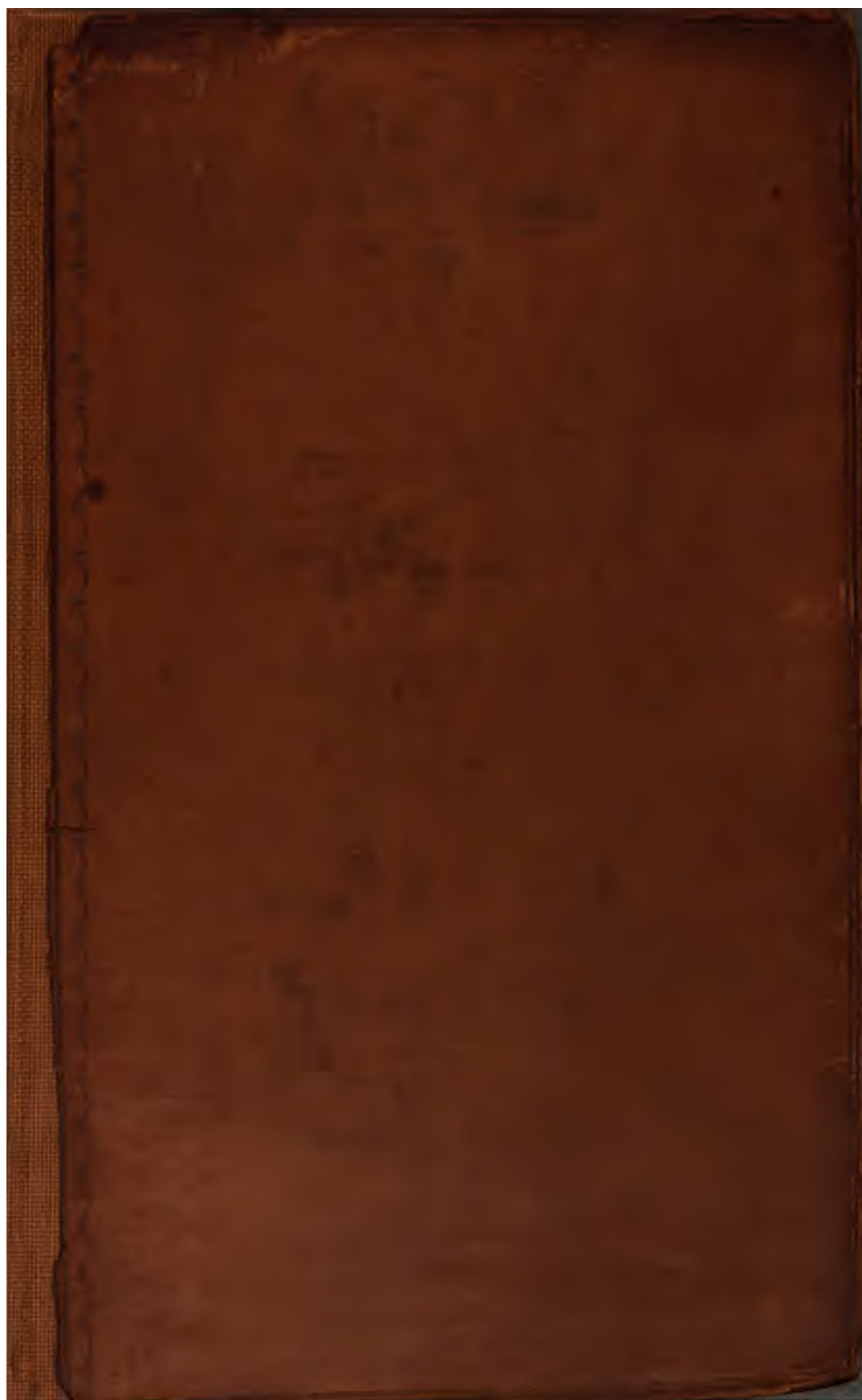
Google is proud to partner with libraries to digitize public domain materials and make them widely accessible. Public domain books belong to the public and we are merely their custodians. Nevertheless, this work is expensive, so in order to keep providing this resource, we have taken steps to prevent abuse by commercial parties, including placing technical restrictions on automated querying.

We also ask that you:

- + *Make non-commercial use of the files* We designed Google Book Search for use by individuals, and we request that you use these files for personal, non-commercial purposes.
- + *Refrain from automated querying* Do not send automated queries of any sort to Google's system: If you are conducting research on machine translation, optical character recognition or other areas where access to a large amount of text is helpful, please contact us. We encourage the use of public domain materials for these purposes and may be able to help.
- + *Maintain attribution* The Google "watermark" you see on each file is essential for informing people about this project and helping them find additional materials through Google Book Search. Please do not remove it.
- + *Keep it legal* Whatever your use, remember that you are responsible for ensuring that what you are doing is legal. Do not assume that just because we believe a book is in the public domain for users in the United States, that the work is also in the public domain for users in other countries. Whether a book is still in copyright varies from country to country, and we can't offer guidance on whether any specific use of any specific book is allowed. Please do not assume that a book's appearance in Google Book Search means it can be used in any manner anywhere in the world. Copyright infringement liability can be quite severe.

About Google Book Search

Google's mission is to organize the world's information and to make it universally accessible and useful. Google Book Search helps readers discover the world's books while helping authors and publishers reach new audiences. You can search through the full text of this book on the web at <http://books.google.com/>



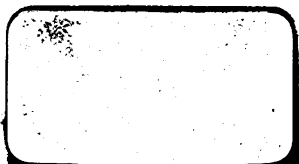
8¹⁰ Jur
a. 18. 39

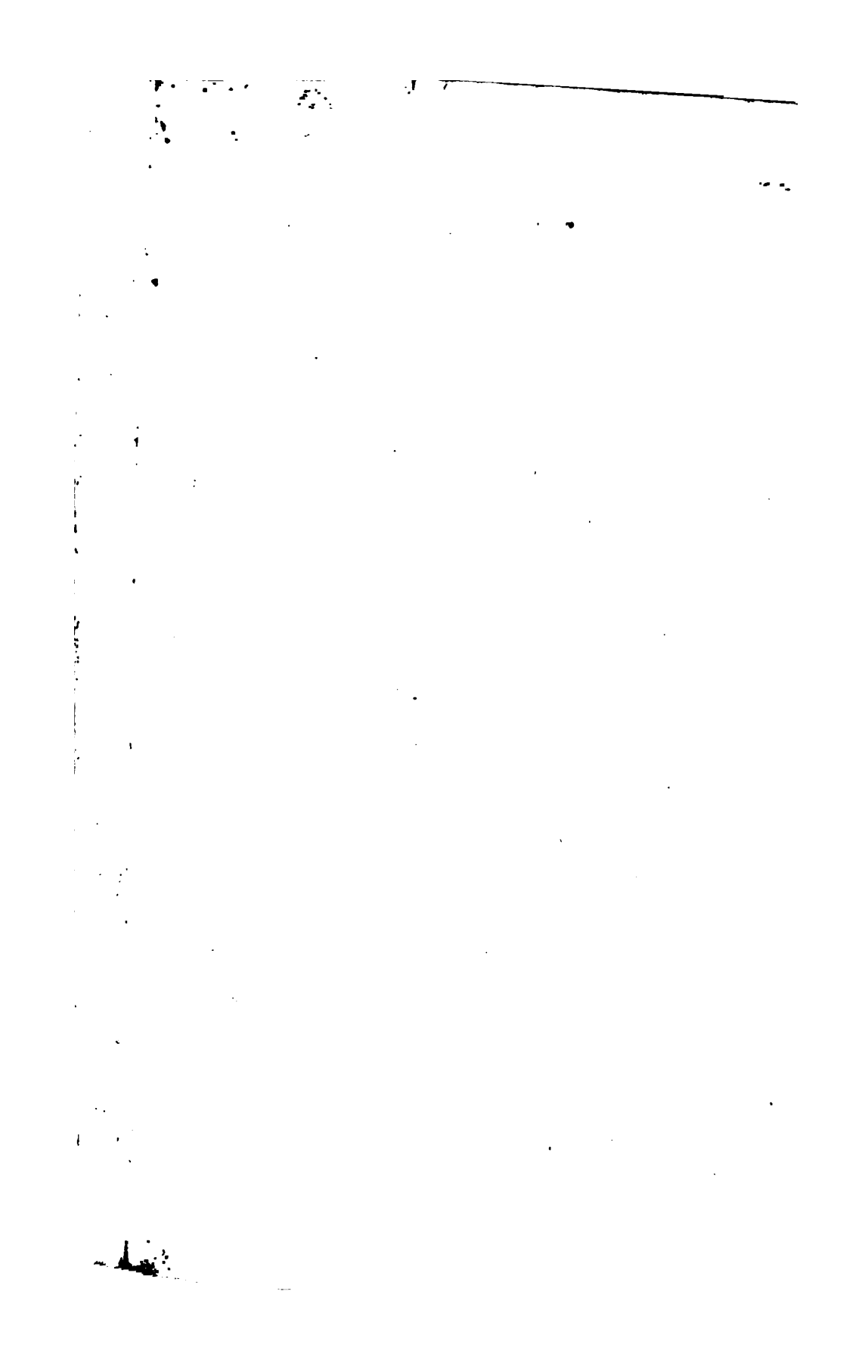
L.L.

CW.U.K:

X 530

CSSS a1





1

B₁

2

3

THE
ORIGIN, PROGRESS,
AND
Present Practice
OF THE
BANKRUPT LAW,
WITH AN
ENGLAND AND IN IRELAND.

By **EDWARD CHRISTIAN,**
Of Gray's Inn, Esq.
BARRISTER AT LAW, A COMMISSIONER OF BANKRUPT, THE
DOYING PROFESSOR OF THE LAWS OF ENGLAND,
&c. &c.

VOL. I.

LONDON:

Printed for **W. CLARKE and SONS,** Law Booksellers,
PORTUGAL STREET, LINCOLN'S INN; AND J. COOKE, DUBLIN.

1812.

W. & J. B. St. John, London.



DEDICATED,

BY PERMISSION,

TO THE

RIGHT. HON. LORD ELDON,

LORD HIGH CHANCELLOR, &c. &c. &c.

MY LORD,

THERE is no branch of the Law of England, that exhibits such extraordinary specimens of contrariety of opinions, and irreconcilable decisions as the Bankrupt Law.

Your Lordship has done much more than any of your predecessors, to establish it upon incontrovertible and unerring principles—The origin, progress, and present practice of the Bankrupt Law, therefore, naturally solicits your Lordship's patronage. In every instance it has been my anxious endeavour, not only to state correctly what is the present practice; but to examine diligently, how far that practice is consistent with the origin of the law, or the express declarations of the legislature. If the result of the

examination should sometimes be at variance with your Lordship's judgments; I am sure that the industry exerted in the investigation, will meet with your approbation, and my conclusions, though erroneous, will be viewed with candour.

I am proud, my Lord, to seize the present opportunity to declare, that the obligations I am under to your Lordship's learning, are only exceeded by those I owe to your kindness and favour.

I have the honor to be,

My Lord,

Your Lordship's

Most obedient humble servant,

EDWARD CHRISTIAN.

Field Court, Gray's Inn,

March 25th, 1812.

P R E F A C E.

FROM my experience as a commissioner of bankrupt, and from the importance of the subject, I have been induced, as the annotator, to add extensive notes to Sir William Blackstone's Chapter upon Bankruptcy; but that chapter, in the last Edition, was printed before the 49 Geo. 3. c. 121 was passed.

So many important changes were introduced into the bankrupt law, by that statute, that I resolved to reprint Sir William Blackstone's Chapter, with the notes corrected, and to prefix to it a short history of the bankrupt law. After making some progress in the abridgment of the statutes, and the decided cases upon them; it occurred to me, that the statutes themselves, existing, and expired, were the best and most satisfactory history of the subject. And if all the decisions abridged, were subjoined according to their chronological arrangement, and observations were made upon them, representing which were, or were not, consistent with the statute, and which were to be considered the law of the present day; I conceived that the whole would necessarily comprize a complete system of bankrupt law, uniting both theory and practice, which probably would be found useful to the profession and the public; and from its novelty would avoid, as much as possible, all rivalry with the valuable publications upon the subject now extant.

In examining the statute, the 11 and 12 Geo. 3, of the Irish Acts of Parliament, which first introduced the bankrupt law into Ireland; I was much pleased to find that it was composed of the preceding English statutes, and that almost every section was *verbatim* the same as some corresponding English section; and it occurred to me, that it might therefore be introduced, without materially enlarging the size of this work.

The second volume will begin with that statute, and where any section is differently expressed from the English statute, it will be given at length; or at least that part of it; and where they are exactly the same, as they generally are, I shall insert only the marginal abstract, with a reference to the English statute; the Acts of Parliament upon Bankruptcy in Ireland and England, being almost word for word the same, the sound construction which is put upon them, by the chancellors and judges in one kingdom, cannot be incorrect in the other.

The correspondence of the former statutes being so exact, the two great statutes brought in by Sir Samuel Romilly, since the Union, viz. the 46 Geo. 3. c. 135, and the 49 Geo. 3. c. 121, are equally applicable to Ireland as to England.

In the dedication, I have observed, that there are more extraordinary contradictions in the bankrupt system, than in any other branch of law. The following work abounds with such specimens: I shall here refer only to a few.

Lord Chancellor Talbot held in a very able judgment, that the petitioning creditor's debt must exist prior to the act of bankruptcy.

Whilst Lord Hardwicke was Chief Justice of the King's Bench, there was an appeal to the House of Lords against Lord Talbot's decree, when the eleven judges being consulted, were of opinion, that Lord Talbot was in an error, and his decree was thereupon reversed.

I trust I have fully demonstrated that Lord Talbot was right, and that the opinion of the eleven judges was greatly erroneous. See p. 202.

The whole history of the law of England, I am inclined to think, cannot produce a similar instance.

Chief Justice Holt and the court decided that the enacting clause of 21 *Jac. c. 19, s. 7*, was restrained by the preamble. Lord Chancellor Cowper decided the contrary with great vehemence; yet Lord Hardwicke and Chief Baron Parker, afterwards adopted the judgment of Lord Holt. Lord Mansfield and the court of King's Bench corrected their error, and established the present law. See p. 47.

Upon the question, whether a man is a trader, who makes bricks from the clay of his own land; we have Lord Thurlow, Lord Mansfield and Judge Buller on one side; but successfully opposed by Lord Loughborough and Lord Ellenborough on the other; see p. 329.

Lord Eldon in *Exparte Hill* overturned a long series of decisions, viz. that costs incurred after bankruptcy in suing for a debt prior to it, might be added to the debt, and might be proved under the commission. One court having made such a judgment, it was over and over again adopted by others, till Lord Eldon pronounced it to be destitute of all principle and in direct violation of the bankrupt statutes. See p. 164.

In such instances the decisions of the courts are like ships at sea, which follow one another, without having a compass on board. They may chance to arrive in safety at their destined port; but there is great danger that they will all be lost and cast away. Almost every page of the following work, will furnish similar fluctuations of opinion; I could point out many instances in former times, where in arguing and deciding the most important questions in the bankrupt law; the counsel,

judges, or chancellors never once referred to, or mentioned, the statute, upon which they depended. What a learned Chief Justice has applied to his predecessor might with equal truth be applied in innumerable instances to other judges and chancellors, viz. "it does not appear that the words of the statute were particularly presented to his judgment at the time." See p. 115 post.

Lord Coke seems to have had a just conception of the necessity of examining acts of parliament from a reply, which he is said to have made to a statesman, who told him that he meant to consult him upon a point of law. "If it be common law," said Lord Coke, "I should be ashamed, if I could not give you a ready answer; but if it be statute-law, I should be equally ashamed, if I answered you immediately."

The statutes in Lord Coke's time were very few compared with their present number.

Whilst I thus seem to cast a censure upon great and illustrious characters, I think it my duty to say that there never was a period, when the highest legal departments were filled with men, who exercised more diligence in research, and more labour in investigation, than the present judges of equity and law.

The statutes being given in chronological order, the decisions under each section, naturally arrange themselves in the same order; and where I have observed a difference of opinion, I have stated in every instance, the progress of the law to the last decision; and have added, after the page of the reporter, the year of our Lord.

One advantage, which I hope the practiser and the student will find in this work, is that when he peruses a decision upon any question of bankrupt law, in Peere-Williams, Atkyns, or any other reporter; if he wishes to know whether it is the law of the present day, he will

see immediately from the arrangement, and the method I have pursued, whether any statute or subsequent case or cases, have made an alteration in the judgment, or whether it remains as the law in practice at the present time. Where I fail to give that information, the execution does not correspond in that instance with the design; and where, in any case, I may have led others into error, I shall make all the amends and satisfaction in my power by the earliest confession and correction of it.

I neither wish nor expect to have my own errors spared; for in every part of this work, I have been as anxious to point out what is erroneous in the judgments of the courts, as what is sound and correct: error sanctioned by a great name, has frequently an extensive circulation, and continues long an obstruction to the ascertainment of the truth.

Even the decisions of a Hardwicke must be read with caution. His chief errors have already been corrected by other courts; but where his judgments are well-founded, he has frequently, in delivering them, advanced propositions demonstrably erroneous. These are generally cited as of equal authority, with the judgment itself upon the point in question. Whenever I have perceived such inaccuracies, I have thought it my duty to state them.

Professing as I do upon every occasion to go up to the head of the fountain, if in tracing back the stream, I find it diverted into an unexpected channel, I have thought it my duty to the best of my ability to explore and discover its legitimate course: or, to change the metaphor, I have considered every doubtful question of the bankrupt law, as a mathematical problem, and where I have not been satisfied by the solution of others, I have presumed to offer my own demonstration, though it may perhaps convince very few besides myself; for such is the liability, even of the most cautious and learned to make

mistakes, that the greatest degree of accuracy consists only in the paucity of errors; and—

Optimus ille,

Qui minimis urgetur.

If I have sometimes presumed to differ from those who preside in the courts of equity and law, from those for whom I entertain the highest reverence, I hope they will attribute the difference of opinion to a zeal for the correct administration of justice, and not to a captious disposition to oppose authority, or a wish to make an ostentatious display of learning misapplied.

In giving the reasons of the chancellors and judges, I have always endeavoured to do it in their own words, at least by citing that sentence, which expresses their strongest reason in the clearest manner. Sometimes the judgment of the court, consists of a great many reasons and authorities, and is incapable of abridgment; and if it appears too long for the nature of my work, I have only stated the substance of the conclusion with a general reference.

Under every head, I have interspersed cases, which have occurred within my own experience as a commissioner, in which we were obliged to act without the assistance of any existing judicial determination.

These cases have of course no authority, but the practice of commissioners of bankrupt, which has been acquiesced in.

It has been my earnest endeavour to explain the principle and grounds of every decision, so that practice and theory may be united, or that the whole may be studied and understood as a science. In addition to our knowledge of the law as it is administered at present; we may be said to be acquainted with it as a science, if we can

explain its history and progress, its consistency or inconsistency with moral abstract justice, and with the principles of liberty, sound policy, and good government. Our proficiency in it as a science will be in proportion to our attainment of that knowledge.

The system of the bankrupt law now forms the most extensive and important branch of the mercantile law of the United Kingdom; and though much has been done, it is probable that it is capable of greater improvement; and I shall feel a pleasing satisfaction, if I should have reason to reflect that my labours have not been in vain; but have contributed in some degree to enable the learned members of my profession to carry the English law as a liberal science to a state of still higher perfection.

EDWARD CHRISTIAN.

Field Court, Gray's Inn,

March 25th, 1812.

THERE being a perpetual reference to the Chancellors in the following work; a list of them, since the 1st of *Eliz.* may probably be thought useful.

Lord Chancellors, Lord Keepers, and Lords Commissioners of the Great Seal of Great Britain, with the dates of their respective appointments, from the year 1559.

1559.	Jan. 13.	Sir Nicholas Bacon	- -	Lord Keeper.
1579.	April 25.	Thomas Bromley	- -	Lord Chancellor.
1587.	April 29.	Sir Christopher Hatton	-	Lord Chancellor.
1592.	May 28.	Sir John Puckering	- -	Lord Keeper.
1596.	May 6.	{ Sir Thomas Egerton, M. R. afterwards Lord Ellesmere	{	{ Lord Keeper. Lord Chancellor.
1616.	Mar. 7.	{ Sir Francis Bacon - afterwards Lord Verulam -	{ - -	{ Lord Keeper. Lord Chancellor.
1620.		{ Lord Mandeville - Duke of Richmond - Earl Pembroke - Sir Julius Cæsar, M. R.	{ - -	{ Lord Commis- sioners.
1621.	July 10.	{ John Williams, Bishop of Lincoln -	{ - -	{ Lord Keeper.
1625.	Nov. 1.	{ Sir Thomas Coventry afterwards Lord Coventry	{	{ Lord Keeper.
1639.	Jan. 23.	Sir John Finch	- -	Lord Keeper.
1640.	Jan. 23.	Sir Edward Littleton	-	Lord Keeper.
1645.	Aug. 30.	Sir Richard Lane	- -	Lord Keeper.
1653.		Sir Edward Herbert	- -	Lord Keeper.
1657.	Jan. 13.	{ Sir Edward Hyde - afterwards Lord Clarendon -	{ - -	{ Lord Chancellor.

1667. Aug. 30.	Sir Orlando Bridgman	-	Lord Keeper.
1672. Nov. 17.	Earl of Shaftesbury	- -	Lord Chancellor.
1673. Nov. 9.	Sir Heneage Finch	- -	} Lord Keeper.
	afterwards		
	Lord Nottingham	- -	} Lord Chancellor.
1682. Dec. 20.	Sir Francis North	- -	} Lord Keeper.
	afterwards		
	Earl of Guilford	- -	
1685. Sept. 28.	Lord Jefferys	-	Lord Chancellor.
1688. Mar. 1.	Sir John Maynard	- -	} Lords Commis-
	Anthony Keck	- -	
	Serjeant Rawlinson	- -	
1690. June 3.	Sir John Trevor	- -	} Lords Commis-
	Sir William Rawlinson	- -	
	Sir George Hutchins	- -	
1693. March.	Sir John Somers	- -	} Lord Keeper.
	afterwards		
	Lord Somers	- -	
1700. May 21.	Sir Nathan Wright	- -	Lord Keeper.
1705. Oct. 23.	William Cowper, Esquire		} Lord Chancellor.
	afterwards		
	Lord Cowper	- -	
1710. Sep. 25.	Sir Thomas Trevor		} Lords Commis-
	Robert Tracy, Esq.		
	John Scroop, Esq.		
1710. Oct. 9.	Sir Simon Harcourt	- -	} Lord Keeper.
	afterwards		
	Lord Harcourt	- -	
1714. Sep. 21.	Earl Cowper	- -	Lord Chancellor.
1718. April 16.	Robert Tracy, Esq.		} Lords Commis-
	Sir John Pratt		
	Sir James Montague		
1718. May 12.	Lord Parker		} Lord Chancellor.
	afterwards		
	Earl of Macclesfield	- -	
1725. Jan. 15.	Sir Joseph Jekyl, M. R.		} Lords Commis-
	Justice Raymond		
	Baron Gilbert	- -	
1725. June 1.	Lord King	-	Lord Chancellor.
1733. Nov. 29.	Lord Talbot	-	Lord Chancellor.
1737. Feb. 21.	Lord Hardwicke		} Lord Chancellor.
	afterwards		
	Earl Hardwicke	- -	

1756. Nov. 19.	{ Sir J. Willes Lord Chief Justice, C. P. Mr. Justice Wilmot - - Mr. Baron Smythe - - }	{ Lords Commis- sioners.
1757. June 30.	{ Sir Robert Henley - - afterwards Earl of Northington - - }	{ Lord Keeper. Lord Chancellor.
1766. June 30.	Lord Camden - -	Lord Chancellor.
1770. Jan. 17.	The Hon. Charles Yorke	Lord Chancellor.
1770. Jan. 21.	{ Mr. Baron Smythe - - Mr. Justice Bathurst - - Mr. Justice Aston - - }	{ Lords Commis- sioners.
1771. Jan. 23.	{ Lord Apsley, after- wards Earl Bathurst - - }	{ Lord Chancellor.
1778. June 3.	Lord Thurlow - -	Lord Chancellor.
1783. April 9.	{ Lord Loughborough Chief Justice, C. P. Mr. Justice Ashurst - - Mr. Baron Eiotham - - }	{ Lords Commis- sioners.
1783. Dec. 23.	Lord Thurlow again - -	Lord Chancellor.
1792. June 12.	{ Lord Chief Baron Eyre Mr. Justice Ashurst Mr. Justice Wilson }	{ Lords Commis- sioners.
1793. Jan. 28.	{ Lord Loughborough, afterwards Earl Rosslyn }	{ Lord Chancellor.
1801. April 14.	Lord Eldon -	Lord Chancellor.
1806. Feb. 7.	Lord Erskine -	Lord Chancellor.
1807. April 1.	Lord Eldon -	Lord Chancellor.

STATUTES.

34 & 35 Hen. 8. cap. 4. 1542.

AN ACT AGAINST SUCH PERSONS AS DO MAKE
BANKRUPT. (1)

WHERE divers and sundry persons, craftily obtaining Preamble.
into their hands great substance of other men's goods, do
suddenly flee to parts unknown, or keep their houses, (2)
not minding to pay or restore to any their creditors, their
duties, but at their own wills and pleasures consume
debts and the substance obtained by credit of other men,
for their own pleasure and delicate living, against all rea-
son, equity, and good conscience: Be it therefore enacted
by the authority of this present parliament, That the
Lord Chancellor of England, or Keeper of the Great
Seal, the Lord Treasurer, the Lord President, Lord
Privy Seal, and other of the King's most honourable
Privy Council, the Chief Justices of either Bench for
the time being, or three of them at the least, whereof
the Lord Chancellor or Keeper of the Great Seal, Lord
Treasurer, Lord President, or the Lord Privy Seal,

(1) See observations upon the derivation and origin
of the word bankrupt, and the translation of it into La-
tin, 2 *Bl. Com.* 472.

(2) The two acts of bankruptcy, specified in this sta-
tute are *fleeing to parts unknown, and keeping house, not
minding to pay their creditors*. Until one of these acts was
done by the debtor, the Lord Chancellor, the two Chief
Justices, and the other high officers of state named in the
statute, had no authority to proceed conformably to the
provisions of it. These are still continued throughout all
the subsequent bankrupt statutes to the present day, as
the chief and most general acts of bankruptcy.

Complaints. to be one, upon every complaint made to them in writing by any parties grieved, (3) concerning the premises, shall have power and authority by virtue of this act, to take by their wisdoms and discretions, such order and directions, as well with the bodies of such offenders aforesaid, wheresoever they may be had, or otherwise, as also with their lands, tenements, fees, annuities, and offices, which they have in fee-simple, fee-tail, term of life, term of years, or in the right of their wives, as much as the interest, right, and title of the same offender shall extend or be, and may then lawfully be departed with, by the said offender, and also with their money, goods, chattels, wares, merchandizes, and debts wheresoever they may be found and known. And to cause their said lands, tenements, fees, annuities, offices, goods, chattels, wares, merchandizes, and debts, to be searched, viewed, rented, and appraised, and to make sale of the said lands, tenements, fees, annuities, and offices, as much as the same offender may then lawfully give, grant, or depart with, or otherwise to order the same, for true satisfaction and payment of the said creditors; that is to say, to every of the said creditors, a portion, rate and rate like, according to the quantity of their debts. And that every direction, order, bargain, sale, and other things done by the said lords, authorized as is aforesaid, in writing signed with their hands, by authority of this act, shall be good and effectual in the law to all intents, constructions, and purposes against the said offenders, their heirs and executors for ever, as though the same order, direction, bargain and sale had been made by the said offender or offenders, at his or their own free will and liberty, by writing indented, inrolled in any the King's courts of record.

Order.

Sale.

(3) In this statute a petition by the party grieved was necessary. The petition of a creditor, who had a debt due prior to the act of bankruptcy, has been continued from the first existence of the bankrupt law.

2. And be it also further enacted by the authority aforesaid, That if after any such act or offence committed, and complaint whereof made to the said lords, as is aforesaid; any party grieved concerning the premises, knowing, supposing, or suspecting any of the goods, chattels, wares, merchandizes, or debts of such offender or offenders, to be in custody, use, occupying, keeping, or possession of any person or persons, or any person or persons to be indebted to any such offender or offenders, do make relation thereof to the said lords, to whom authority is given by this present act, as is aforesaid, that then the said lords shall by virtue hereof have full power and authority to send for and convent afore them, by such process, ways **Process.** or means, as they shall think convenient, by their discretions, all and every such person and persons so known, supposed, or suspected to have any such goods, chattels, wares, merchandizes, or debts, in his or their custody, use, occupation, keeping, or possession, or supposed or suspected to be indebted to such offender or offenders: and **Examination.** upon their appearance, to examine them and every of them, as well by their oaths as otherwise, by such ways and means, as the said lords by their discretions shall think meet and convenient, for and upon the specialty, certainty, true declaration, and knowledge, of all and singular such goods, chattels, wares, merchandizes, and debts, of any such offenders, as be supposed or suspected to be in his or their custody, use, occupation, or possession, and of all such debts as by them, or any of them, shall be supposed or suspected to be owing to any such offender. And if any such person or persons upon such examination do not disclose, plainly declare, and shew the whole truth of such things as he or they shall be examined of, **Concealment:** concerning the premises, then every such person or persons so examined, and not declaring the plain and whole truth concerning the premises, upon due proof thereof to be

Forfeit.

made before the said lords therefore authorized, as is aforesaid, by witness, examination, or otherwise, as to the same lords shall seem sufficient in that behalf, shall lose and forfeit double the value of all such goods, chattels, wares, merchandizes, and debts by them or any of them so concealed, and not wholly and plainly declared and shewed; which forfeitures shall be levied and recovered by the said lords, having authority as is aforesaid, by such ways and means as to them shall seem requisite and convenient. And the same forfeiture to be distributed and employed to and for the satisfaction and payment of the debts of the said creditor or creditors, in such like manner, rate and form, as is above declared concerning the ordering of the goods and chattels of the said offenders, keeping their houses, or flying to places unknown, as is aforesaid.

Claim.

3. And be it also further enacted by the authority aforesaid, That if after any such person or persons shall keep his or their houses, or flee to parts unknown, as is aforesaid, any person or persons do fraudulently, by covin or collusion, claim or demand any debt, duty, or other thing, by writing or otherwise, of any such offender or offenders, other than such as he or they can and do prove to be due by right and conscience, in form aforesaid, before the said lords having authority by this present act, as is aforesaid, and the same to proceed *bonafide*, without fraud or covin: that then every such person and persons, so craftily demanding or claiming any such debt, duty, or other thing, as is aforesaid, shall forfeit and lose double as much as he or they shall so claim or demand. And the same forfeiture to be levied, recovered, and imployed, in manner and form as is afore rehearsed.

Collusions.

4. And be it also further enacted by the authority aforesaid, That if any such person or persons, which shall keep his or their houses, or flee to parts unknown, as is aforesaid, or intend to delay or defraud their creditors de-

ceitfully by covin or collusion, suffer or cause any other person or persons to recover against him or them any debis, goods, chattels, wares, or merchandizes, without just cause and title so to do, proceeding *bona fide*, without fraud or covin, that then upon complaint thereof made to the said lords having authority by this present act, as is aforesaid, the said lords shall have power and authority by virtue hereof to convent and call before them the said recoverer or recoverers, and after such fraud, déceit, covin, or collusion, shall plainly appear, or be duly proved before the said lords authorized as is aforesaid, all the said goods and chattels of the said offender so recovered, shall be chargeable, imployed, ordered, and delivered toward the payment of the true and due debts of the said creditor, after the manner, form, and rate, as is afore specified, by the discretion of the said lords, having authority by this present act, the aforesaid false and feigned recoveries notwithstanding, so that always such false and feigned recoveries shall not be in force, or any execution thereby had of or upon any goods, chattels, lands, or tenements of any such offender or offenders, until such time as all his or their true and due debts and duties shall be fully satisfied, contented, and paid to his or their creditors. And nevertheless after that the said true debts and duties shall be fully satisfied and paid, as is aforesaid, as well the body of the said offender, as his lands, tenements, goods, and chattels, shall be charged and liable to the Execution. execution of the said recovery, according to the tenor, force, and effect of the same.

5. And be it also enacted by the same authority, That Complaint. if any such person or persons, which shall be indebted, do withdraw himself out of this realm, and other the King's dominions, into any foreign realm, or country, to the intent thereby to abide and remain, in defraud of his creditors; that then upon complaint in writing concerning the premises thereof made to the said lords having authority,

Proclamation.

as is aforesaid, the same lords shall, by virtue and authority of this present act, have full power and authority to award proclamations to be made in such places as to them shall be thought meet and convenient, commanding by the same such offender in the King our sovereign lord's name, to return with all convenient speed into this realm, and to yield his body before the said lords, having authority as is aforesaid, or one of them. And if the said person within three months next after he shall have knowledge of such proclamation, or as soon after as he conveniently may, do not repair and yield his body as is aforesaid, that then the body of all and every such offender and offenders, shall be judged, taken, and deemed, to all intents and purposes, out of the King's protection, and that also all goods, chattels, lands, tenements and debts of every such offender shall be by the order and discretion of the said lords, imployed and distributed amongst his creditors equally and indifferently, rate for rate, in like manner and form as is afore declared. And that also every person or persons, that shall willingly help to aid, imbezil, or convey any such person or persons, their said goods, chattels, wares, or merchandizes, out of this realm, and other the King's dominions, into any foreign realm or place, knowing the said person or persons to depart or withdraw themselves, or convey their said goods, chattels, wares, and merchandizes, for the cause and intent aforesaid, shall suffer such pains by imprisonment of their bodies, or pay such fine to our sovereign lord the King, his heirs or successors, as to the said lords, having authority by virtue of this present act, shall seem meet and convenient for their said offence or offences.

Aiders.**Creditors.**

6. Provided always, and be it enacted by the authority aforesaid, That if the creditors of any such offender or offenders, which shall keep his or their house or houses, or which shall absent or withdraw themselves into places unknown, for the cause aforesaid, be not fully satisfied

and paid, or otherwise contented, for their debts and duties, by the ways and means afore specified and declared, that then the said creditor and creditors, and every of them, shall and may have their remedy for the recovery and levying of the residue of the same debts or duties, whereof they shall not be fully satisfied and paid, or otherwise contented, in form aforesaid, against the said offender or offenders, in like manner and form as they should or might have had, before the making of this act. And that the said creditor and creditors, and every of them, shall be only barred and excluded, by virtue of this act, of and for all and every such part and portion of the said debts and duties, as shall be paid, satisfied, distributed, or delivered unto him or them by the said lords, having authority as is aforesaid, and of no more portion or parcel thereof, any thing herein specified, that may be taken or construed to the contrary notwithstanding. (4)

(4) By this statute the description of a bankrupt was not confined to a trader, but every debtor who had committed one of the acts of bankruptcy specified, might have been proceeded against as a bankrupt, and his property might have been equally distributed among all his creditors. The lords, as they are called, had their authority to act from the statute, not from any commission.

This statute continued alone for twenty-eight years, but I have not found a single case in the books upon the construction of any part of it. It is the foundation of the whole system of the bankrupt law; and the chief provisions of it being copied into the subsequent statutes, it may be useful when an ambiguity of expression occurs in them to refer to it in order to ascertain the intention of the legislature. The preamble of the next bankrupt statute, 13 Eliz. c. 7, states that it is passed for the better provision for the repression of bankrupts, *and for a plain declaration to be made and set forth, who is and ought to be taken and deemed for a bankrupt.* It must have been thought that bankrupts from that time were confined to traders, and to the description under that and the following statutes, and therefore that this statute (though not

13 Eliz. cap. 7. 1570.

AN ACT TOUCHING ORDERS FOR BANKRUPTS.

Who is a bankrupt, how and by whom his body, lands and goods, shall be ordered for payment of the creditors.

FORASMUCH as notwithstanding the statute made against bankrupts in the 34th year of the reign of our late sovereign lord King *Henry* the Eighth, those kinds of persons have and do still increase into great and excessive numbers, and are like more to do, if some better provision be not made for the repression of them : And for a plain declaration to be made and set forth, who is and ought to be taken and deemed for a bankrupt : Therefore be it enacted and established by the authority of this present parliament, That if any merchant, or other person, using or exercising the trade of merchandize, by way of bargaining, exchange, rechange, bartry, chevisance, or otherwise in gross or by retail, or seeking his or her trade or living, by buying and selling, and being subject born of this realm, or any of the Queen's dominions, or denizen, sithence the first day of this present parliament, hath or at any time hereafter shall depart the realm, or begin to keep his or her house or houses, or otherwise to absent him or herself, or take sanctuary, or suffer him or herself willingly to be arrested for any debt or other thing, not grown or due for money delivered, wares sold, or any other just or lawful course, or good consideration or purposes, hath or will suffer him or herself to be outlawed, or yield him or herself to prison, or depart from his or

Who shall be said a bankrupt.

by express words), was virtually and substantially repealed.

Lord Hardwicke has observed " that the statute of Henry the 8th has been so much altered by subsequent acts that it does not deserve any consideration, therefore laying that act out of the case, I will begin with the 13 Eliz. cap. 7." 1 *Atk.* 77.

her dwelling house or houses, to the intent or purpose to defraud or hinder any of his or her creditors, being also a subject born, as is aforesaid, of the just debt or duty of such creditor or creditors, shall be reputed, deemed, and taken for a bankrupt. (1)

2. And be it enacted by the authority aforesaid, That the Lord Chancellor of *England*, or Lord Keeper of the Great Seal of *England*, for the time being, upon every com-

Lord Chancellor may grant a commission to take order for bankrupts' bodies, lands, and goods.

(1) This statute, which is now the foundation of all the bankrupt law, as it is administered at present, is confined to merchants and traders.

No other persons, except those described by this and subsequent statutes, can be made bankrupts.

The trading and acts of bankruptcy are still further described by 1 Jac. c. 15; the 21 Jac. 1, c. 19; and the 5 Geo. 2, c. 30. See 2 *Bl. Com.* and Notes, 474, et seq.

In the 11 and 12 Geo. 3, a most important statute was passed by the parliament in Ireland, which incorporated all the material parts of the English statutes. Most of the sixty-six sections which compose that statute, are verbatim the same as corresponding sections of some of the English statutes. Thinking that it would be of service to gentlemen of the profession, and to all who may have occasion to refer to the bankrupt law, to be able to see readily the correspondence or disagreement of that law in England and Ireland, I have given at length those few sections in which there appears to be a difference; but where they are exactly the same I have referred only to the similar section in the preceding English statute. The description of traders and acts of bankruptcy are extracted from all the preceding English statutes in the first section of the Irish statute, and in the notes to that section, I shall point out what is the difference, where there is any, between that and the English statutes.

As far as the 1 J. 1, c. 15, and 21 J. 1, c. 19, have made an alteration of the description of the trader, or the act of bankruptcy, they must be considered to have repealed this statute in effect, being the last will or declaration of the legislature.

It seems to be a rule of construction founded in reason, that "statutes introductive of a new law penned in the affirmative, do always repeal former statutes concerning the same matter, as implying a negative." 1 *Shon.* 520. 9 *East.* 47.

The authority of the commissioners over the person and property of the bankrupt.

plaint made to him, in writing, against such person or persons being bankrupt, as is before defined, shall have full power and authority, by commission under the great seal of *England*, to name, assign, and appoint, such wise and honest discreet persons, as to him shall seem good: Who or the most part of them, by virtue of this act and of such commission, shall have full power and authority to take by their discretions such order and direction, with the body and bodies of such person, wheresoever he or she may be had, either in his or her house or houses, sanctuary, or elsewhere, as well by imprisonment of his or her body or bodies, as also with all his or her lands, tenements, hereditaments, as well copy or customary hold, as freehold, which he or she shall have in his or her own rights, before he or she became bankrupt, and also with all such lands, tenements, and hereditaments, as such person shall have purchased, or obtained, for money or other recompence, joyntly with his wife, children or child, to the only use of such offender or offenders, or of or for such use, interest, right, or title, as such offender or offenders then shall have in the same, which he or she may lawfully depart withal, or with any person or persons of trust to any secret use of such offender or offenders, and also with his or her money,

The words in the conclusion of the first section are extremely material, "shall be reputed, deemed, and taken for a bankrupt;" that is, every trader who shall commit or do any of the acts specified, from that moment is a bankrupt, and by the next section the commissioners have authority to dispose of all the estate and effects he had "*when he became bankrupt*," and their order shall be effectual against all persons claiming by any act made or done after such person "*shall become bankrupt*." This is the origin of the relation to the act of bankruptcy, upon which so many important decisions have depended.

The words of the statute are clear and unequivocal. It is still in force except as far as it has been modified and restrained by 1 J. c. 15, s. 14; 21 J. c. 19, s. 14; and by 46 Geo. 3, c. 135, which has almost reduced it to nothing.

How far it exists at present will be explained in the second volume. *Appendix A.*

goods, chattels, wares, merchandizes, and debts, where-soever they may be found or known, and cause the said lands, tenements, fees, annuities, offices, goods, chattels, wares, merchandizes, and debts, to be searched, viewed, rented, and appraised to the best value they may, and by deed indented, inrolled in one of the Queen's Majesty's courts of record, to make sale of the said lands, tenements, and hereditaments, and of all deeds, writings, and evidences, touching only the same, belonging to such offender or offenders, debtor or debtors; and also of all fees, annuities, offices, goods, and chattels, or otherwise to order the same for true satisfaction and payment of the said creditors; that is to say, to every of the said creditors, a portion, rate like, according to the quantity of his or their debts: and that every direction, order, bargain, sale, and other thing done by the said persons so authorized, as is aforesaid, shall be good and effectual in the law, to all intents, constructions, and purposes, against the said offender or offenders, debtor or debtors, his or their wife or wives, heir or heirs, child and children, and such person and persons, as by such joynt purchase with the said offender or offenders, as is aforesaid, have or shall have any estate or interest in the premises, and against all other person or persons claiming, by, from, or under such offender or offenders, debtor or debtors, by any act or acts had, made or done after any such person shall become bankrupt, as is aforesaid, and also against the lords of the manors, whereof the said copyhold or customary lands be holden, their heirs, successors, and assigns, and every of them. (2)

Commissioners
may sell bankrupt's
lands,
goods, &c.

Against what
persons the
commissioners
sale of a bankrupt's
lands,
goods, &c. shall
be available.

(2) A greater abundance and variety of important matter cannot probably be found in any other section in all the statute books than is contained in this. It introduces the complaint in writing, that is, the petition of a creditor; the chancellor, with authority to appoint commissioners; the commission; the authority of the commissioners to seize and dispose of all the bankrupt's property, which he had in his own right, or jointly with others; the power

Vendees of
copyhold lands
shall compound
with the lord
of the manor
for their
fines.

3. Provided always, and be it enacted by the authority aforesaid, That all and every person and persons, to whom any such sale of copyhold or customary lands or tenements shall be made, shall, before such time as they or any of them shall enter or take any profit of the same lands or tenements, agree and compound with the lords of the manors of whom the same shall be holden, for such fines or incomes, as heretofore hath been most usual and accustomed to be yielded or paid therefore; and that upon every such agreement or composition, the said lords for the time being, at the next court to be holden at or for the said manors, shall not only grant unto the said *vendee* or *vendees*, upon request, the same copy or customary lands, or tenements, by copy of court roll of the same manors, for such estate or interest as to them shall be so sold, and reserving the ancient rents, customs, and services; but also in the same court admit them tenants of the same copy and customary lands, as other copyholders of the same manors have been wont to be admitted, and to receive their fealty accordingly. (3)

to apprehend the bankrupt; the warrant of seizure; the relation to the act of bankruptcy; the inventory and appraisement of the bankrupt's estate and effects; the bargain and sale enrolled; the proof of debts; the dividend; the inability of the bankrupt to dispose of his property after the act of bankruptcy; the transfer of copyholds by the bargain and sale, by which the lord is bound. The commissioners power to apprehend the bankrupt, where it is necessary, must be exercised according to the directions of 5 Geo. 2. c. 30. sect. 14.

(3) General assignees did not exist by the three first statutes, but the purchasers of the bankrupt estate took immediately from the commissioners.

The vendee of the commissioners cannot receive the rents and profits of the estate till he has agreed with the lord for the accustomed fine, and then the lord is bound to admit him as any other copyholder.

If the copyhold of the bankrupt is conveyed by the commissioners to a general assignee under the 5 Geo. 2. c. 30, he must pay a fine to the lord, and when he surrenders again to a purchaser, he must pay another fine. Lord Hardwicke has therefore advised, that copyholds

4. Provided always, and be it enacted by the authority aforesaid, That such of the said commissioners as shall put the said commission in execution, shall, upon lawful request to them made by the said bankrupts, not only make a true declaration to the same bankrupt, of the employing and bestowing of their said lands, tenements, offices, fees, goods, chattels, and debts so paid and satisfied; to their said creditors, but also make payment of the overplus of the same, if any such shall be, to the said bankrupts, their executors, administrators, or assigns. (4)

The commissioners shall declare to the bankrupt how they have bestowed his lands and goods, and pay the overplus to him.

should not be conveyed to the general assignees, but should be conveyed immediately by the commissioners to the purchaser, in consequence of which only one fine will be due to the lord, and no inconvenience can ensue as copyholds cannot be affected by an extent from the crown. *Drury v. Man*, 1 Atk. 96.

(4) All debts, which carry interest, have interest computed upon them only to the date of the commission, but if there is a surplus, after all the debts proved shall have received 20s. in the pound, interest is to be calculated and paid upon all the bonds, bills or debts bearing interests, and then the remaining surplus is to be paid over to the bankrupt, but interest is not to be computed beyond the penalty of a bond. If the bankrupt is dead intestate, then the interest is to be paid out of the personal estate; but if that is not sufficient, and there is real property of the bankrupt unsold, so much of it is to be sold as will make up the deficiency. If there is a surplus both of personal property and real property, after the payment of interest, then the personal property must be assigned to the bankrupt's next of kin, and the real estate to the heir at law. *Eromley v. Goodere*, 1 Atk. 75.

Interest will be allowed in the proof of debts even where it does not appear upon the face of the instrument or contract, if it can be shewn by direct or circumstantial evidence to have been the intention of the contracting parties. *Ex parte Hankey*, 3 Bro. 504.

In the case of a surplus the bankrupt must have his allowance before the creditors are allowed interest, *Ex parte Morris*, 3 Bro. 79. The Master of the Rolls has decided that interest should be allowed in equity upon a promissory note or bill of exchange payable on demand, or upon a certain day, from the demand, or from the day, as damages

The remedy
where goods or
debts of bank-
rupt be in the
hands of others.

and to examine
on oath.

5. And be it further enacted by the authority aforesaid, That if after any such act or offence committed, and complaint thereof made to the said commissioners so to be appointed, as is aforesaid, or the more part of them, by any party grieved, as is aforesaid, concerning the premises, knowing, supposing or suspecting any of the goods, chattels, wares, merchandizes, or debts of such offender or offenders, debtor or debtors, to be in the custody, use, occupying, keeping, or possession of any person or persons; or any person or persons to be indebted to any such offender or offenders; do make relation thereof to the said commissioners so to be appointed, or the more part of them: that then the said commissioners, or the most part of them, shall by virtue hereof, and of the said commission, have full power and authority to send for, and call before them, by such process, ways or means, as they shall think convenient by their discretions, all and every such person or persons so known, suspected, or supposed to have any such goods, chattles, wares, merchandizes, or debts, in his or their custody, use, occupation, keeping or possession, or supposed or suspected to be indebted to such offender or offenders, and, upon their appearance, to examine them,

are allowed at law. *Lowndes v. Collins*, 15th February 1801. Interest ought therefore in such cases to be computed in bankruptcy as if it had been expressed.

Lord Redesdale has decided in the Court of Chancery in Ireland, that a voluntary or gratuitous bond may be proved under a commission of bankrupt, but it must be postponed to all other debts, or that nothing must be allowed upon it until all other debts are satisfied, and then it shall be paid out of the surplus, and the remainder, if any, shall be paid over to the bankrupt. Where a voluntary bond was given to a wife and children after marriage he said, "The proper order to make in case of a voluntary bond is not to expunge it, but that it shall not be set up against the creditors; but if there be a surplus, after payment of all joint and separate debts, the party shall be allowed to come in." *Assignees of Gardiner v. Skinner*, 2 Sch. and Lefroy, 228.

and every of them, as well by their oaths as otherwise, by such ways and means as the said commissioners, or the more part of them by their discretions shall think meet and convenient, for and upon the specialty, certainty, true declaration and knowledge of all and singular such goods, chattels, wares, merchandizes, and debts of any such offender or offenders as be supposed or suspected to be in his or their custody, use, occupation, or possession, and all such debts, as by them shall be supposed or suspected to be owing to any such offender or offenders. (5)

6. And if any such person or persons, upon examination, do not disclose and plainly declare and shew the whole truth of such things, as he or they shall be examined of concerning the premisses, to his knowledge, or do deny to swear, then every such person or persons so denying to swear, or being examined do not declare the plain and whole truth concerning the premisses, upon due proof thereof to be made before the said commissioners, or the more part of them so to be appointed, as is aforesaid, by witness, examination, or otherwise, as to the said commissioners, or the more part of them, shall seem sufficient in that behalf, shall lose and forfeit double the value of all such goods, chattels, wares, merchandizes, and debts, by them or any of them so concealed, and not wholly and plainly declared and shewed: which forfeiture shall be levied by the said commissioners, or the more part of them, of the lands, tenements, hereditaments, goods, and chattels, of such person so denying to swear, or not disclosing the whole truth, as is aforesaid, by such ways and means, and in such manner and form, as is before limited and appointed for the principal offender or offenders, debtor or debtors; and the same forfeiture or forfeitures, to be distributed or employed to and for the satisfaction and payments of the debts of the said creditor or creditors, in such like manner, rate, and form, as is before declared, con-

The penalty of such as be examined, that will not disclose the truth, or refuse to swear.

How the forfeiture shall be recovered and employed.

to be applied to the payment the bankrupt's debts.

(5) See this more fully provided in 1 J. 1. c. 15, sect. 10.

cerning the ordering of the lands and tenements, offices, fees, goods and chattels of such offender or offenders, debtor or debtors, as is aforesaid. (6)

A remedy
against those
who detain the
goods of the
bankrupts.

7. And be it further enacted, That if at any time before or after that any such person or persons, departeth the realm, or shall keep his or their house or houses, or otherwise absent him or themselves, or take sanctuary, or suffer him or themselves to be arrested, outlawed, or yield his or their bodies to prison, as is aforesaid: any person or persons do fraudulently, by covin or collusion, claim, demand, recover, possess, or detain any debts, duties, goods, chattels, lands, or tenements, by writing, trust, otherwise, which were or shall be due, belonging or appertaining to any such offender or offenders, other than such as he or they can and do prove to be due by right and conscience in form aforesaid, for money paid, wares delivered, or other just consideration or cause reasonable, to the just value thereof, before the said commissioners so to be appointed, or the more part of them, as is aforesaid, and the same to proceed (*bona fide*) without fraud or covin: that then every such person or persons, so craftily demanding, claiming, having, possessing, or detaining any such debt, duty, or other thing as is aforesaid, shall forfeit and lose double as much as he or they shall so claim, demand, detain, or possess; which said forfeiture shall be levied, recovered, and employed in manner and form as is afore rehearsed.

How the forfei-
tures shall be
bestowed after
the bankrupt's
debts be paid.

8. Provided also, and be it enacted by the authority aforesaid, That if it shall fortune the creditors of any such bankrupt, as is aforesaid, to be satisfied and paid off their debts and duties, of or with the proper lands, tenements, goods, chattels, and debts of the said bankrupt's, or of or with the same, and some part of the forfeitures of the said double values, to be forfeited, as is aforesaid, and that there shall remain an overplus of the said forfeiture of the said

(6) The penalty by the 1 J. 1. c. 15, sec. 11, is made the punishment of perjury.

double values; that then the one moiety of the said overplus of the said forfeitures of the double values so remaining, shall be by the said commissioners so executing the said commission, within convenient time after the levying thereof, paid unto the Queen's Majesty, her heirs and successors; and the other moiety thereof shall be by the said commissioners imployed and distributed to and amongst the poor within the hospitals in every city, town, or county, where any such bankrupt shall happen to be; any thing in this act to the contrary thereof notwithstanding. (7)

9. And be it further enacted by the authority aforesaid, That if any such person or persons, which is or shall be indebted, do of purpose withdraw him or themselves out of or from his or their usual mansion house or houses: that then upon complaint thereof made to the said commissioners, having authority as is aforesaid, the same commissioners, or the more part of them, shall by virtue and authority of this present act, have full power and authority to award five proclamations to be made, in the Queen's name, upon five sundry market days, in such places near the place where such bankrupt hath most commonly dwelled or made his abode, commanding him or them by the same proclamation in the Queen's name to return with all convenient speed, and to yield his or their body before the said commissioners, having authority as is aforesaid, or one of them, at such time and place, as by the said proclamation shall be appointed: and if the said person do not according to such proclamation repair and yield his or their body, as is aforesaid, that then the

A remedy
against him
who withdraw-
eth himself
from his dwell-
ing place.

(7) It may be doubted whether these two last sections are now in force, and whether they are not repealed by the 11 and 12 of the next statute, 1 J. 1. c. 15.

If the party denies falsely he has the bankrupt's property, he is subject to the penalties of perjury; if he admits it, it then may be recovered for the benefit of the creditors and of the bankrupt.

Penalty of a bankrupt not yielding himself after proclamation, and of such as do hide or receive him.

body of all and every such offender or offenders shall be adjudged, taken, and deemed to all intents and purposes out of the Queen's protection: and that also every person and persons, that shall willingly and wittingly help to hide or convey, or shall willingly receive, detain, or keep secretly any person or persons so demanded by proclamation, as is aforesaid, shall suffer such pains by imprisonment of his or their bodies, or pay such fine to our sovereign lady the Queen's Majesty, her heirs and successors, as to the Lord Chancellor, or Lord Keeper of the Great Seal (being informed thereof by the commissioners so to be appointed as is aforesaid, or the more part of them) shall seem meet and convenient, for their said offence or offences. (8)

A remedy for the creditors if he be not satisfied for his whole debt.

10. Provided always, and be it further enacted, That if the creditors of any such offender or offenders, debtor or debtors, which so do depart the realm, keep his or their house or houses, or otherwise absent or withdraw him or themselves into places unknown, or take sanctuary, or will suffer him or themselves to be arrested or outlawed, or yield his or their bodies into prison purposely, and for the causes aforesaid, be not fully satisfied, or otherwise contented for their debts and duties by the ways and means before specified and declared: that then the said creditor or creditors, and every of them, shall and may have their remedy for the recovery and levying of their said debts or duties whereof they shall not be fully satisfied, paid, or otherwise contented, in form aforesaid, against the said offender or offenders, in like manner and form as they should and might have had before the making of this act. And that the said creditor or creditors,

(S) This section is virtually repeated by the 5 Geo. c. 30. sect. 1, which makes the bankrupt liable to suffer death if he does not surrender himself conformably to the directions of that statute.

and every of them, shall be only barred and excluded, by virtue of this act, of and for every such part and portion of the said debts and duties, as shall be paid, satisfied, distributed, or delivered unto him or them by order of the said persons, as is aforesaid, and of no more portion or parcel thereof; any thing herein specified that may be taken or construed to the contrary notwithstanding. (9)

(9) This section proves most incontestably that the discharge of the bankrupt formed no part of the policy or design of the original bankrupt law until the debts of the bankrupt were fully satisfied. From this section it is also clear that the creditor might receive a dividend or dividends, and afterwards sue the bankrupt for the remainder; but he could only have a remedy against his person, for by the next section all his after-acquired property was subject to the authority of the commissioners. In the year 1738 an assignee had received two dividends, and had sued the bankrupt and held him in execution for the remainder. Lord Hardwicke ordered the creditor to refund the dividends if he intended to elect to proceed at law. This section is not mentioned in the case. How a statute which is expressed with so much clearness, or without any ambiguity, could be rendered of no avail by any authority less than that which created it, I am unable to explain. *Ex parte Capot*, 1 Atk 219. In 1799 a similar action exactly was brought in the Court of King's Bench, in which the defendant was arrested, and upon a motion to discharge the defendant out of custody upon filing common bail, Lord Kenyon referred the defendant to the Court of Chancery, "as the usual forum for the decision of such questions." It is very extraordinary that this section was there never referred to. *Oliver v. Ames*, 8 T. R. 364. By 49 Geo. 3. c. 121. sect. 10: if any creditor has commenced any action or suit for any demand which might be proved as a debt; he shall not prove or claim such debt without relinquishing the action or suit; and the proof or claim of a debt shall be deemed an election to take the benefit of such commission with respect to the debt proved or claimed. These last words may be considered a repeal of this section. See more cases upon election in the note to that section.

This section is of great importance to uncertificated bankrupts. The discharge and certificate were not intro-

Lands, &c. extendable, which he purchased,

11. Provided always, and be it also enacted by the authority aforesaid, That if any person or persons; who

duced until the 4 and 5 Ann. c. 17 expired, and they now depend upon the 5 Geo. 2. c. 30. No assignment of any kind exists under this statute, but the commissioners were to take possession themselves, or by their officers, of all the tangible property, and were to deliver it and sell it for the benefit of the creditors. The 21 James 1. c. 19. sect. 8, was introduced to remove doubts that they themselves or any person by their warrant might break open doors to obtain possession of the bankrupt's property. This section declares that all the future property of the bankrupt until all his debts are satisfied, may be dealt with precisely in the same manner as that which he was possessed of when he became bankrupt. Since general assignees were introduced by 5 Geo. 2. c. 30, Lord Hardwicke has said "that all his future personal estate is affected by the assignment; and every new acquisition will vest in the assignees; but as to the future real estates there must be a new bargain and sale," *Ex parte Proudfoot*, 1 Atk. 253. The assignment operates, I apprehend, as a general authority to seize, or as a warrant of seizure. That no new assignment is necessary in the case of newly acquired personal property has lately been confirmed in a very important modern case: *Kitchen v. Barish*, 7 East 53.

In that case the plaintiff brought an action to recover the money he had lent to the defendant. The defendant pleaded that the plaintiff was a bankrupt, and had never obtained his certificate, that after the undertaking of the defendant, he was requested to pay to them the money he owed the plaintiff. The plaintiff replied that the defendant had treated with him as a person capable of receiving credit. To this there was a general demurrer. There was judgment for the defendant. It is fully established by the judgment that all the future property of an uncertificated bankrupt passes to the assignees for the benefit of his creditors, but where the assignees claim they are entitled to the property.

Lord Ellenborough observed, "that it is contended that the objection cannot be set up by a third person; and *Chippendale v. Thomlinson* (Cooke 431) is referred to as shewing that the bankrupt is entitled to the earnings of his personal labour, without which it is said he would be left to starve, which could not have been

is or shall be punished and declared to be a bankrupt by virtue of this act, shall at any time after purchase any lands, tenements, hereditaments, free or copy, offices, fees, or goods, or chattles : or that any lands, tenements, hereditaments, free or copy, offices, fees, goods or chattles shall descend, revert, or by any means come to any such person or persons, being bankrupts, as is aforesaid, before such time as their debts due to their creditors shall be fully satisfied and paid, or otherwise agreed for; that then the said lands, tenements, hereditaments, as well free as copy, offices, fees, goods and chattles, shall by virtue of this act, by the said commissioners to be appointed, as is aforesaid, or the more part of them, be bargained, sold, extended, delivered, and used for and towards the payment of the said creditors, in such like manner and form, as other the lands, tenements, hereditaments, free or copy, offices, fees, goods, and chattles, of the said bankrupts, which they had when they were declared first to be bankrupts, should or might have been bargained, sold, disposed, or used by virtue of this act.

This section is copied *verbatim* into the 11 and 12 Geo. 3, c. 8, Irish statute, sect. 8.

12. Provided always, That this act shall not extend to Lands convey-

"intended by the legislature. The hardship of that case "might perhaps have warped the opinion of the judges, "when the evil might have been better remedied by statute. There is now, however, an invariable practice of "above twenty years in support of that series of cases."

It seems to be agreed, from the authority referred to by Lord Ellenborough, that the bankrupt may recover the earnings of his labour for his daily subsistence contrary to the consent of his creditors, for if he were deprived of these, he would cease to work. But this can only apply to what is necessary for the support of himself and family. Any accumulation beyond that would fall under the general law. But when the assignees do not interfere the bankrupt may recover any property in an action, for he has a right and title to it against all the rest of the world. *Webb v. Fox*, 7 T. R. 391. *Fowler v. Down*, 1 Bos. and Pull. 44.

ed away before
the party be-
came bank-
rupt.

any lands, tenements, or hereditaments, free or copyhold, which heretofore have been assured by any such bankrupt, or hereafter shall be assured by any bankrupt before he become bankrupt: so that always such assurance be made *bona fide*, and not to the use of the bankrupt himself only, or of his heirs; and that the parties to whose use such assurance hath or shall be made, be not, at or before the making of such insurance, privy or consenting to the fraudulent purpose of any such bankrupt, to deceive his creditors.

1 Jac. 1. cap. 15. 1604.

AN ACT FOR THE BETTER RELIEF OF THE CREDITORS
AGAINST SUCH AS SHALL BECOME BANKRUPTS.

Preamble.

FOR that frauds and deceits, as new diseases, daily increase amongst such as live by buying and selling, to the hindrance of traffic and mutual commerce, and to the general hurt of the realm, by such as wickedly and wilfully become bankrupts; and for that the description of a bankrupt in former statutes is not so fully expressed, nor the power given thereby to the commissioners for bankrupts so large, as is meet, in such cases of deceit, to prevent the deceitful actions of bankrupts.

Who shall be
adjudged a
bankrupt.

2. For remedy whereof, be it therefore enacted by our sovereign Lord the King, and by the lords spiritual and temporal, and commons, in this present parliament assembled, and by the authority of the same, That all and every such person and persons, using or that shall use the trade of merchandize, by way of bargaining, exchange, bartry, chevisance, or otherwise, in gross, or by retail, or seeking his or their trade of living by buying and selling, and being a subject born of this realm, or any the King's dominions, or denizen, who at any time sithence the first

day of the present parliament, or at any time hereafter, shall depart the realm, or begin to keep his or her house or houses, or otherwise to absent him or herself, or take sanctuary, or suffer him or herself willingly to be arrested for any debt, or other thing not grown or due for money delivered, wares sold, or any other just or lawful cause, or good consideration or purposes, or hath or will suffer him or herself to be outlawed, or yield him or herself to prison, or willingly or fraudulently hath or shall procure him or herself to be arrested, or his or her goods, money, or chattels to be attached or sequestered, or depart from his or her dwelling-house, or make or cause to be made any fraudulent grant or conveyance of his, her, or their lands, tenements, goods, or chattels, to the intent or whereby his, her, or their creditors, being subjects born as aforesaid, shall or may be defeated or delayed for the recovery of their just and true debts; or being arrested for debt, shall after his or her arrest, lie in prison six months or more upon that arrest, or upon any other arrest or detention in prison for debt, and lie in prison six months upon such arrest or detention, shall be accompted and adjudged a bankrupt to all intents and purposes. (1)

(1) The privilege of sanctuary was taken away by the 21 Jac. c. 28, sect. 7.

The lying in prison after any arrest or detention for debt is reduced to two months, by 21 Jac. 1. c. 19, sect. 2.

By sect. 15, foreigners or aliens are affected by the bankrupt statutes in the same manner as natives.

The acts of bankruptcy introduced by the 13 Eliz. c. 7, are here repeated again, with some difference of expression, and as far as the words are material they would operate as a repeal of the former statutes. See ante. 13 Eliz. n. 1.

But being statutes in *pari materiâ* what is clearly expressed in the first will assist in explaining any ambiguity in this or any other subsequent statute. See 1 Bl. Comm. 60. n. 8.

In the 13 Eliz. c. 7, the acts, which made a trader a bankrupt, were to be done *to the intent or purpose* to defraud his creditors: by this statute, the 1 Jac. the words

The like commissions, orders, benefits, and remedies, as be provided for bankrupts by the statute 13 El. c. 7.

3. And be it further enacted by the authority of this present parliament, That the like commissions, orders, benefits, and remedies, which are and be provided and limited by the said former act of parliament (made in 13 *nuper Eliz. Regina*) against bankrupts therein described, or for or concerning his, her, or their lands, tenements, hereditaments, fees, annuities, offices, goods, chattels, wares, merchandizes, and debts, or any of them, shall be had, pursued, taken and expounded against such person and persons, that are herein expressed to be bankrupts, his, her, and their lands, tenements, hereditaments, fees, and annuities, offices, goods, chattels, wares, merchandizes, and debts, in such like manner and form, as the same ought or might have been, if the persons herein described to be bankrupts had been described to be bankrupts according to the intent of the said former statute.

New creditors partakers with the former.

4. And that it shall be lawful for any creditors of the said bankrupt, within four months after any such commission shall be sued forth, and until distribution shall be made by the said commissioners for the payment of the bankrupt's debt, as in such case hath been used, to par-

are to the intent or whereby his creditors may be defeated. In *Fowler v. Paget*, 7 T. R. 510, Lord Kenyon and the court of King's Bench determined *or whereby* must be construed *and whereby*, and that to constitute an act of bankruptcy, by departing the realm, or beginning to keep house, or otherwise absenting himself, &c. a creditor must actually be delayed.

But this subject being afterwards considered by Lord Ellenborough and the court, they determined that the words used by the legislature in this act had no signification different from the words *to the intent or purpose* in the former statute, and therefore departing the realm, beginning to keep house or absenting himself, &c. with the intent or purpose to delay creditors, though no creditor was in fact delayed, was an act of bankruptcy, *Robertson v. Liddell*, 9 East. 487. See the acts of bankruptcy further considered under the 11 and 12 Geo. 3. c. 8, Irish Statute, and 2 Bl. Comm. 478, in the next vol.

take and join with the other creditors that shall sue forth any such commission, for satisfaction and payment of his, her, or their debts, to him or them owing, without any hindrance, let, or disturbance of any of the said commissioners, or any of the other creditors of any such bankrupts, the same creditors so coming in to contribute to the charges of the said commission; and that if the creditors come not in within four months, then the commissioners to have power to distribute. (2)

5. Be it further enacted, That if any person, which hereafter is or shall be a bankrupt, by intent of this statute, shall convey or procure, or cause to be conveyed to any of his children, or other person or persons, any manors, lands, tenements, hereditaments, offices, fees, annuities, leases, goods, chattels, or transfer his debts into other men's names, except the same shall be purchased, conveyed, or transferred for or upon marriage of any of his or her children, both the parties married being of the years of consent, or some valuable consideration, it shall be in the power and authority of the commissioners in this behalf to be appointed, or the more part of them, to bargain, sell, grant, convey, demise, or otherwise to dispose thereof, in as ample manner as if the said bankrupt had been actually seized or possessed thereof, or the debts were in his own name, of the like estate or interest to his or their own use, at such time as he or she became bankrupt; and that every such grant, bargain, sale, conveyance, and disposition of the said com-

A bankrupt conveying his lands or goods to others, or transferring his debts into other men's names.

Irish statute, section 6.

(2) By this section no creditor could have any benefit from the commission unless he would contribute to the expence of it.

But by the 5 Geo. 2. c. 30, sect. 25, the costs of the commission shall be paid by the assignees out of the bankrupt's estate, and every creditor shall be permitted to prove without any contribution. The effect is ultimately the same. The dividend will be so much the less. But it will be more agreeable to the creditors to keep so much money in their own pockets.

missioners, or of the greater part of them, shall be good and available to all intents, constructions, and purposes in the law, against the offender or offenders, his heirs, executors, administrators, and assigns, and such children and persons as shall be subject to this statute, and against all other person and persons, claiming by, from, or under such offender or offenders, or such said other persons, to whom such conveyance shall be made by the said bankrupt, or by his means or procurement. (3)

In what case he that doth withdraw himself shall be proclaimed a bankrupt.

6. And for that the practices of bankrupts of late are so secret and so subtil, as that they can very hardly be found out or brought to light; and for that the former statute, giving power to the commissioners to examine others than the bankrupts, hath not fully or sufficiently authorized them to examine the said bankrupt upon oath: for remedy whereof, be it further enacted by the authority of this present parliament, That the said commissioners may call before them, or the greater part of them, the said bankrupt: and if upon lawful warning left or made in

(3) But if a man when he is not a trader, and when he is not in debt, makes a settlement upon his wife and children, without any fraudulent intent or purpose, and afterwards becomes a trader and a bankrupt, this settlement cannot be disturbed by the bankruptcy; for otherwise there would be no security in family settlements. *Crisp v. Pratt*, Cro. Car. 548. *Lilly v. Osborn*, 3 P. Williams, 298.

The Chancellor seemed to think that a gift of a sum of money by a trader to a son for his advancement was not within the statute. *Ex parte Shortland*, 7 Ves. 88.

But the statute appears to comprehend every gift or grant to children except upon their marriage. What is allowed for their education and maintenance could not be considered to be conveyed or granted. A settlement by a trader upon his wife is within the statute, and void with regard to the creditors, as far as the settlement is made with the husband's land or money; but she will be allowed as much of it as was her own property. *Glaister v. Hewer*, 9 Ves. 12. 11 Ves. 377.

writing at three several times at the dwelling place or house, where the said bankrupt, his wife, or family, for the most part of his abode, did lodge or remain, within one year next before he, she, or they became bankrupt, the said bankrupt shall not appear before the said commissioners, or the greater part of them, that then and from thenceforth it shall be lawful for the greater number of the said commissioners to appoint to proclaim the said party a bankrupt, at such publick place or places, where the said commissioners or the greater part of them, shall think meet, warning him, her, or them, to appear before them upon the said commission, at some time appointed: and that if upon five several proclamations made in some publick place, the party offending appear not before the said commissioners, and yield his, her, or their bodies to them, or some of them, the said commissioners, or the greater part of them, shall or may award a warrant to such fit person or persons as they think meet, to apprehend the body and bodies of the said offender and offenders, and to bring him, her or them so offending before the said commissioners, wheresoever the said party or parties offending may be found, in place privileged or not, to be examined by the said commissioners, or the greater part of them. (4)

A bankrupt apprehended, which upon warning refusal to appear.

7. And that it shall be lawful for the said commissioners, or the greater part of them, to examine the said offender or offenders upon such interrogatories touching the lands, tenements, goods, chattels, debts, bills, bonds, books of accompt, and such other things, as may tend to disclose his, her, or their estate, or their secret grants, conveyances, and eloining of his, her, or their lands, tenements, goods, money, and debts, as they shall think meet.

The examination of a bankrupt.

(4) This is in effect repealed by 5 Geo. 2. c. 30. sect. 1, which enacts that the bankrupt shall suffer as a felon without benefit of clergy, if he does not surrender and conform to the directions of that statute.

Bankrupt refusing to answer.

8. And that if therein the offender or offenders shall refuse to be examined, or to answer fully to every interrogatory to him to be ministered by the said commissioners, or the greater part of them, it shall be lawful for the said commissioners, or the greater part of them, to commit the said offender or offenders to some strait or close imprisonment, there to remain, until he, she, or they shall better conform him or herself.

The punishment of a bankrupt committing perjury.

9. And that if upon his, her, or their examination it shall appear that he, she, or they have committed any wilful or corrupt perjury, tending to the hurt or damage of the creditors of the said bankrupt, to the value of ten pounds of lawful money of *England*, or above, the party so offending shall or may thereof be indicted in any of the King's Majesty's courts of record, and, being lawfully convicted thereof, shall stand upon the pillory in some public place by the space of two hours, and have one of his ears nailed to the pillory, and cut off.

10. And whereas by the former statute made in the said thirteenth year of the reign of the late Queen *Elizabeth*, the commissioners for bankrupts have power given to them to send for such person or persons, as the creditors shall know, suppose or suspect to have, detain, or keep any part of the money, goods, chattels, or debts of the said offender or offenders, or to be indebted to the said offender or offenders, to be examined by the said commissioners, as by the same statute appeareth, but have not good means or remedy, by imprisonment or other penalty, to procure the person so sent for by them to appear before them, nor having appeared before them, to make answer upon his oath to such interrogatories as shall be ministered unto him by the said commissioners, for and upon the specialty, certainty, true declaration, and knowledge of such lands, tenements, hereditaments, goods, debts or other things of any such offender or offenders, as be, or shall be, or which shall be suspected to be in his custo-

dy, use, or possession, or in the custody, use, or possession of any other to his knowledge, and of all debts owing to or for the benefit of such offender or offenders, by himself, or by any other to his knowledge, so as many times a great part of the offender or offenders' lands, tenements, hereditaments, goods, chattels, or debts, which by the true intent of the said statute should be employed to the satisfaction of the creditors of the offender or offenders, are concealed or detained in the hands of such person and persons, as refuse to come, or, being come, refuse to be sworn before the said commissioners, to be examined in that behalf, to the great encouragement of all bankrupts and their wicked confederates and accessaries, and to the great hindrance of the just remedies of the creditors of the said bankrupts for their true and just debts to them owing: for remedy whereof, be it further enacted by the authority aforesaid, That if any person or persons being known, supposed, or suspected to have or detain any part of the lands, tenements, or hereditaments, goods, chattels, or debts of the said bankrupt, or to be indebted to or for the benefit of the said bankrupt, shall (after lawful warning to the said person or persons given to come before the said commissioners, or the greater part of them, to be examined according to the intent of the said statute) refuse to come, or shall not come before the said commissioners at the time appointed, having no lawful impediment (such as shall be admitted and allowed of by the said commissioners, or the more part of them, and which shall be then signified or made known to the said commissioners at the time of their assembly) or that any such person or persons, having knowledge or warning of any other assembly or meeting of the said commissioners again, shall not come and appear before them at such time, as he or she lawfully may come, having no such lawful impediment as shall be then made known to the said commissioners, and by them admitted and allowed of as aforesaid, or being

Examina-
tion of such as
have bankrupts
goods, or be in-
debted unto
them.

The punishment of such as will not appear, or not swear and answer to interrogatories.

come before them shall refuse to be sworn and to make answer to such interrogatories as shall be ministered unto him or them, according to the true intent and meaning of the said statute made in the said thirteenth year of the reign of our said sovereign lady Queen *Elizabeth*, or of this present act, that then it shall be lawful for the said commissioners, or for the greater part of them, to commit to such ward and prison, as to them or to the greater part of them shall be thought meet, all such person and persons as shall so refuse to be sworn and make answer to such interrogatories as shall be so ministered as aforesaid ; and also to direct their warrants to such person or persons, as to them or the greater part of them shall be thought meet, to apprehend and arrest such person or persons, as shall refuse to appear before them as aforesaid, and to bring him, her, or them before the said commissioners, or the greater part of them, to be examined as abovesaid ; and upon his, her, or their refusal to come or to be examined before the said commissioners as aforesaid, to commit the said party so refusing to such prison, as the said commissioners, or the greater part of them, shall think meet, there to remain, without bail or mainprise, until such time as the said person so refusing to come, or to be sworn to answer before the said commissioners, shall submit him or herself to the said commissioners, and be by them examined, according to the true intent of the said statute, and of this present act. (5)

(5) By the 13th Eliz. c. 7. sect. 5 and 6, the commissioners have power to examine all persons who can give any material information respecting the bankrupt's property, and this section gives them additional authority to compel the attendance of witnesses. In a late case, where an action for false imprisonment was brought against the commissioners, this section was much considered. The Court held, that if the witness summoned, did not appear at the meeting appointed, or make known to the

11. Provided always, that such witnesses as shall be so sent for, shall have such costs and charges as the commissioners in their discretion shall think fit; the same charges to be rateably born by the creditors of the said bankrupt, according to the proportion of each of their several debts. And if any person or persons, other than the bankrupt, either by subornation, unlawful procurement, sinister persuasion, or means of any others, or by his own act, consent, or agreement, shall wilfully and corruptly commit any manner of wilful perjury by his deposition to be taken before the said commissioners, or the greater part of them, as aforesaid, that then the party or parties so offending, and all and every person and persons, that shall unlawfully and corruptly procure any such unlawful wilful and corrupt perjury, shall or may therefore be indicted in any of the King's Majesty's courts of record, and after his or their conviction thereof, shall

Witnesses allowed their costs.

Irish Stat.s. 33.

The penalty of others, beside the bankrupt, committing perjury.

commissioners some just impediment for his absence, it was not necessary to issue a second summons. It had been the practice to give a second warning *ex abundanti cautela*. *Battye v. Gresly*, 8 East. 319.

This section is very confused, it will therefore be advisable for commissioners to proceed conformably to the construction which the court have put upon it in that case, viz. first to issue a summons, and then if no just cause is given for the non-attendance of the witness at the meeting to which he is summoned, to issue a warrant to apprehend him, and bring him before them to be examined at another appointed meeting; and if he shall then refuse to be sworn and make answer to the interrogatories, to commit him to prison until he shall submit to be examined.

If he has no money to convey himself, that may be a lawful impediment within the statute, but it rests upon him to make that excuse properly known to the commissioners at their meeting.

In the above case it was decided that if the commissioners consult together and resolve that a warrant shall issue, they may afterwards execute it separately.

See more upon private examinations, 5 Geo. 2. c. 30. sect. 16, 17.

incur such forfeiture, and receive and suffer such pains and punishment, as are limited by the statute made concerning perjury, in the fifth year of the reign of our late sovereign lady Queen *Elizabeth*. (6)

Creditors only shall recover the forfeitures, and how they shall employ them.

12. And be it further enacted, That all and every sum and sums of money, which shall be forfeited by force of this present act, shall be sued for and recovered by the said creditors only, or any of them, that will sue for the same, by action of debt, bill, plaint, or information, in any of the King's Majesty's courts of record : and the sum or sums of money so recovered (the charges of suit being deducted) shall be distributed and divided towards the payment of the said creditors of the bankrupt.

Authority of commissioners touching debts due to a bankrupt.

13. And for that the power and authority given to the commissioners of bankrupts, touching the debts due to the said bankrupts, is not so full and perfect, as that the full benefit thereof in due course might be employed to the use of the said creditors, as was intended ; for remedy thereof be it further enacted by the authority aforesaid, That the commissioners of bankrupts, or the greater part of them, shall have power to grant and assign, or otherwise to order or dispose all or any of the debts due, or to be due, to and for the benefit of the said bankrupt, by what person or persons soever, or in what manner and form soever, to the use of the creditors of the said bankrupt, according to the true intent of the said former

Irish stat. s. 13.

(6) It has been decided in *Battye v. Gresley*, 8 East 319, that it is not necessary under this statute to tender a witness the expenses of his journey when he is summoned to attend a meeting of the commissioners ; they are to be allowed and ordered afterwards by the commissioners. But if it were properly made known to the commissioners that want of money was the cause of the non-attendance of the witness, they ought, I conceive, to consider it as a lawful impediment. But if they are not duly certified of that fact, their warrant to apprehend the witness and to bring him before them is legal.

recited statute of bankrupts ; and that the same grant, assignment, or disposition of the said debts, in form aforesaid to be made by the said commissioners, or the greater part of them, shall so vest the property, right, and interest of the said debt and debts in the person or persons of him, her, or them, to whom it shall be granted, assigned, or ordered by the said commissioners, or the greater part of them, as fully, to all intents and purposes, as if the said bill, bond, bonds, statutes, recognizances, judgment, or contract, whereupon the said debt or debts, deed or deeds, shall arise or grow, had been made to, or with, or for the said person or persons, to whom the same shall be so granted, assigned, or disposed by the said commissioners; and that after such grant, assignment, or disposition made of the said debts, that neither the bankrupt, nor any other, to whom any such debt shall be due, shall have power to recover the same, nor to make any release or discharge thereof, neither shall the same be attached as the debt of the bankrupt, or such said other person or persons, to whom the same shall be due, by any other person or persons, according to the custom of the city of *London*, or otherwise, but that the party or parties, to whom the same debt shall be assigned, shall have like remedy to recover the same, as fully and lawfully, in the name or names of the person or persons, to whom the same shall be so granted, assigned, or ordered, by the said commissioners, in all respects and purposes, as the party himself might have had: any law, statute, use, or custom, to the contrary thereof in any wise notwithstanding. (7)

The remedy for the creditor to recover a bankrupt's debt assigned to him by the commissioners.

(7) It is both amusing and instructive to trace the origin and progress of the bankrupt law. The 13 Eliz. c. 7, sect. 2, had given the commissioners power to dispose of the bankrupt's lands, goods and chattels, but it was doubtful whether this power extended to the debts due

Debtor paying
to the bankrupt
without notice
not to be affect-
ed.

14. Provided always, That no debtor of the bankrupt be hereby endangered for the payment of his or their debt, truly and *bona fide* to any such bankrupt, before such time as he shall understand or know that he is become a bankrupt. (8)

to the bankrupt. This is the first time that the word *assign* is used.

There is only one case in Lord Coke's reports upon the bankrupt statutes, viz. *The case of bankrupts*, 2 Co. 25. 31 Eliz. It contains much important matter.

It appears from that case that the commissioners divided the goods amongst the creditors, or sold them to the creditors according to the appraisement. One point there decided was that the commissioners might sell goods of which they were not in possession, and that the vendee might maintain trover against the person who had them in his possession, though after the act of bankruptcy the goods had passed through several hands.

It was held that the words of the statute 13 Eliz. c. 7, did not require that the sale of goods and chattels should be made by a deed inrolled, and that a distribution should be made only amongst those creditors who came before the commissioners and prayed the benefit of the statute. This section introduces the assignee of a debt due, or to be due, to the bankrupt.

No assignee chosen by the creditors, and to whom all the bankrupt's estate and effects were to be assigned by the commissioners, was introduced before the 5 Ann. c. 22. sect. 4, expired. These are now called general assignees. But wherever the assignee of the commissioners is mentioned before that time his authority depends upon this section, or he is a vendee under the statute of Eliz. The mode by which they would shew their title to recover the bankrupt's property would be the same.

The first bankrupt case in Cro. Jac. is upon this statute, in which it was decided the assignees of debts might sue in their own names, as the statute expressly declares, and that the defendant might have the same defence as he might have had against the bankrupt, and the action being upon a contract, he was therefore permitted to wage his law. *The case of Bradshaw*, Cro. Jac. 125, 3 Jac. 1.

(8) The 13 Eliz. c. 7. sect. 2, has given the commissioners power to sell all the lands, goods, and chattels, which were

15. Provided also, and be it further enacted, That such Commissioners shall declare of the said commissioners as shall put the said commission in execution, shall, upon lawful request to them to the bankrupt, not only make a true declaration to the said bankrupt, of the imploying and bestowing of his, her, or their said lands, tenements, and hereditaments, offices, fees, goods, wares, money, chattels, and debts, which shall be paid and satisfied to their said creditors, as is in like case limited and appointed by the said former statute made in the said thirteenth year of the said late Queen's Majesty's reign, but also make payment of the overplus of the same, if any such shall be, to the said bankrupts, their executors, administrators, and assigns; and that the said bankrupts, after the full satisfaction of the said creditors, shall have full power and authority to recover and receive the residue and remainder of the debts to them owing; any thing in this act contained to the contrary in any wise notwithstanding. (9)

Irish stat. s. 22.

16. Be it further enacted, That if any action of trespass or other suit, shall happen hereafter to be brought against any commissioner authorized by the statute made

belonging to the trader, when the act of bankruptcy was committed; and the preceding section would have been equally extensive with respect to debts due to the bankrupt.

But this most important section protects those who have paid the bankrupt without notice of his bankruptcy, from the liability to pay again to an assignee of the commissioners; if there had been a similar clause for those who received a debt *bonâ fide* from the bankrupt without notice of bankruptcy, the 19 Geo. 2. c. 32, and 40 Geo. 3. c. 135, would in a great degree have been unnecessary.

But the legislature at that time thought it better policy to deprive the bankrupt of all power of disposing of his property even after an act of bankruptcy unknown to his creditors in general.

(9) See 13 Eliz. c. 7. sect. 4, how the surplus is to be restored to the bankrupt.

The commis-
sioners plea in
an action
brought against
them.

in *decimo tertio* of our late sovereign lady Queen *Elizabeth* for bankrupts, or any other person or persons having authority by virtue or under the commission, authorizing the said commissioner for the doing or executing of any matter, by force of the said statute, or this present statute, that the defendant or defendants, in any such action or suit, may plead not guilty, or otherwise justify that the act or thing whereof the plaintiff or plaintiffs complained, was done by authority of the said act made in the thirteenth of *Elizabeth*, or in this present act respectively, without expressing or rehearsal of other matter or circumstance contained in either of the said acts, and without enforcing him or them to shew forth their commission authorizing the said act or thing, whereunto the plaintiff shall be admitted to reply, that the defendant did the fact supposed in the declaration of his own wrong, without any such cause alledged by the said defendant, whereupon the issue in such action shall be joined to be tried by verdict of twelve men; and upon the trial of that issue, the whole matter to be given on both parties in evidence, according to the very truth of the same; and if verdict upon such issue shall pass for the defendant, the defendant to have his costs. (10)

The commis-
sioners shall
proceed o exe-
cution though
bankrupt die.

Irish stat. s. 6.

17. Provided always, and be it further enacted, That after any commission of bankrupts hereafter sued forth, and dealt in by the commissioners, the offender happen to die before the commissioners shall distribute the goods, lands, and debts of the offenders, or any of them, by force of the aforesaid statute of the thirteenth year of the reign of our late sovereign lady Queen *Elizabeth*, and this statute, or either of them, that then nevertheless the said

(10) It is fully settled in the case of *Miller v. Scare*, 2 Bl. 1144, that an action will lie against the commissioners if they exceed or abuse the authority given them by the bankrupt statutes.

commissioner shall and may in that case proceed in execution, in and upon the said commission, for and concerning the offender's goods, lands, tenements, hereditaments and debts, in such sort as they might have done if the party offender were living. (11)

21 Jac. I. c. 19. 1623.

AN ACT FOR THE FURTHER DESCRIPTION OF A BANKRUPT, AND RELIEF OF CREDITORS, AGAINST SUCH AS SHALL BECOME BANKRUPTS, AND FOR INFLICTING CORPOREAL PUNISHMENT UPON THE BANKRUPTS IN SOME SPECIAL CASES.

FORASMUCH as daily experience sheweth, that the number and multitude of bankrupts do increase more and more, and also the frauds and deceits invented and practised for the avoiding and eluding the penalties of the good laws in that behalf already made, and the remedy by them provided: and for that divers defects are daily found in the former statutes made against bankrupts, both in the description of a bankrupt, as also in the power given to the commissioners for the discovery and distributing the bankrupt's estate, to the great encouragement of evil-minded persons, the hindrance of traffick and commerce, the great decay, overthrow, and undoing of many clothiers, by whom many thousands of the natural born subjects of

Laws made against bankrupts shall be beneficially construed for the creditors.

(11) Lord Chancellor Talbot has declared that whatever was done in pursuance of the commission was a dealing in it, if never so minute. *Warrington v. Nortons*, *Forr*. 184.

It should seem then, if the commissioners meet and qualify themselves by taking the oath, and the bankrupt dies after that time, they may proceed, but if he dies before that time they ought not to proceed, or the commission ought to be superseded.

this realm, be from time to time in all parts of this kingdom set on work : all which do tend to the general hurt of this realm : for remedy whereof be it enacted by the King's most excellent Majesty, the lords spiritual and temporal, and commons, in this present parliament assembled, and by the authority of the same, That all and singular the aforesaid statutes and laws, heretofore made against bankrupts, and for relief of creditors, shall be in all things largely and beneficially construed and expounded for the aid, help, and relief of the creditors of such person or persons as already be, or hereafter shall become bankrupt.

Who shall be
deemed a bankrupt.

Acts of bankruptcy.

2. And that all and every person or persons using, or that shall use the trade of merchandize, by way of bargaining, exchange, bartering, chevisance, or otherwise, in gross, or by retail, or seeking his or her living, by buying and selling, or that shall use the trade or profession of a scrivener, receiving other men's monies or estates into his trust or custody, who at any time after the end of this present session of parliament, shall, either by himself, or others by his procurement, obtain any protection or protections, other than such person or persons as shall be lawfully protected by the privilege of parliament, or shall prefer or exhibit unto his Majesty, his heirs or successors, or unto any of the King's courts, any petition or petitions, bill or bills, against his or her creditor or creditors, or any of them, thereby desiring or endeavouring to compel or enforce them, or any of them, to accept less than their just and principal debts, or to procure time, or longer days of payment, than was given at the time of their original contracts, or, being indebted to any person or persons in the sum of one hundred pounds or more, shall not pay, or otherwise compound for the same, within six months next after the same shall grow due, and the debtor be arrested for the same, or within six months after an original writ sued out to recover the said debt, and notice thereof

given unto him, or left in writing at his or their dwelling house or last place of abode, or being arrested for debt, shall, after his or her arrest, lie in prison two months or more, upon that or any other arrest or detention in prison for debt; or being arrested for the sum of one hundred pounds or more, of just debt or debts, shall at any time after such arrest escape out of prison, or procure his enlargement by putting in common or hired bail, shall be accounted and adjudged a bankrupt to all intents and purposes; and in the said cases of arrest, or lying in prison for such debt or debts, or getting forth by common or hired bail, from the time of his or her said first arrest. (1)

3. And be it further enacted by the authority of this present parliament, That the like commissions, orders, benefits, and remedies, which are and be provided and limited by the said former acts of parliament, made in the thirteenth year of the late Queen *Elizabeth*, and in the first year of the reign of our sovereign Lord the King's Majesty, against any bankrupts, in them oreither of them described, or for or concerning his, her, or their lands, tenements, hereditaments, fees, annuities, offices, goods, chattels, wares, merchandize, and debts, or any of them, shall and may be had, pursued, taken and expounded against such

Commissions, orders, &c. provided by 13 *El.* 7. and 1 *Jac.* 15. shall be pursued against him that is described to be a bankrupt by this act.

(1) Who is to be considered a scrivener, will be explained under the 11 and 12 Geo. 3, c. 8, sect. 1, Irish statute.

The obtaining protections, and exhibiting petitions to compel the creditors to take less than their debts have long been disused; all the rest of this section is repealed by the 10 Ann. c. 15, except that if any trader being arrested for debt, shall, after his or her arrest or detention in prison for debt, lie in prison two months or more upon that or any other arrest or detention in prison for debt; or being arrested for the sum of one hundred pounds or more, of just debt or debts, shall at any time after such arrest escape out of prison, he shall be adjudged a bankrupt, and in such cases of arrest or lying in prison for such debt or debts from the time of his or her said first arrest.

person and persons as are herein and hereby declared, described, or expressed to be bankrupts, and against his, her, and their lands, tenements, hereditaments, fees, annuities, offices, goods, chattels, wares, merchandize, and debts, in such manner and form, as the same ought and might have been, if the persons herein declared, described, or expressed to be bankrupts, had been by the said statutes, or either of them, described to be bankrupts, to all intents and purposes whatsoever.

Orders, &c. provided by this act shall be pursued against him that is described to be a bankrupt by 13 El. c. 7. & 1 Jac. c. 15.

4. And be it further enacted by the authority aforesaid, That the same orders, benefits and remedies, which are, and be provided and limited by this present act, against any bankrupts, in or by this act declared, described, or expressed to be bankrupts, or for or concerning his, her or their lands, tenements, hereditaments, fees, annuities, offices, goods, chattels, wares, merchandizes, and debts, or any of them, or the discovery of them, or any of them, shall from henceforth be had, pursued, taken, and expounded against such person or persons, as are declared or expressed to be bankrupts, by the said former acts of parliament, or either of them, and against his, her, and their lands, tenements, hereditaments, fees, annuities, offices, goods, chattels, wares, merchandizes, and debts, in such manner and form as the same ought and might have been, if the persons in the former statutes, or either of them, described to be bankrupts, had been mentioned and described to be bankrupts in and by this present act.

The bankrupt's wife may be examined for discovery of the bankrupt's property.

5. And whereas by the former laws the commissioners appointed have power to examine the bankrupt himself, and such person or persons as are suspected to have or detain any of the estate, goods, or chattels of the bankrupts, but some doubt hath been made whether the commissioners have power to examine the wives of the bankrupts touching the same, by reason whereof the bankrupts wives do daily conceal and convey away, and cause to be conveyed away much part of their husband's monies, wares,

goods, merchandize, and other estate, to person or persons unknown to any but such wives, by reason whereof much of the bankrupt's estate is concealed and detained from the creditors.

6. For clearing therefore the said doubt, and avoiding the inconveniences aforesaid, be it declared and enacted by the authority aforesaid, That after such time as any person shall by the said commissioners, executing the said commission, or the greater part of them, be lawfully adjudged or declared to be a bankrupt, the said commissioners executing such commission, shall have power and authority to examine upon oath the wife and wives of all and every such bankrupt, for the finding out and discovery of the estate and estates, goods, and chattels, of such bankrupt or bankrupts, concealed, kept, or disposed of, by such wife or wives, in their own persons, or by their own act or means, or by any other person or persons. And that she and they, the said wife and wives, shall incur such danger and penalty for not coming before the said commissioners, or for refusing to be sworn and examined, or for not disclosing the truth upon his or their examination or examinations, as in and by the said former laws, or either of them, is already made and provided against any other person or persons in like cases. (2)

(2) There is a short report in *Brownlow* which proves that the doubt stated in the preamble to this section had existed, *Anon.* 10 Jac. A. D. 1612. *Brownlow*, 47.

"The court was moved to know whether the wife of a bankrupt can be examined by the commissioners upon the statute of bankrupt, and they were of opinion she could not be examined." This short case is of great importance to shew what steps the commissioners took to obtain information and indemnity at the commencement of the exercise of their authority. It will be endeavoured to be proved in Appendix B. that from similar motions and applications the court of Chancery has acquired its present extensive jurisdiction in bankruptcy.

The bankrupt that fraudulently conceal-eth his goods, or rendereth not some just reason why he became bankrupt, shall be set upon the pillory, and lose one of his ears.

7. And be it further enacted by the authority aforesaid, That if any bankrupt shall upon his or her examination or examinations, to be taken before the said commissioners, executing the said commission, be found fraudulently or deceitfully to have conveyed away his or her goods, chattels, lands, tenements, offices, fees, rents, or annuities, or other estate, or any part thereof, to the value of twenty pounds or above, to the end and purpose to hinder the execution of this statute, or of any other the aforesaid statutes, or thereby to defraud, delay, or hinder his or her creditors of the same, and shall not, upon his or her examination, discover unto the said commissioners, and (if it lie in his or her power) deliver unto the said commissioners, all that estate, goods, and chattels, so fraudulently and deceitfully conveyed away, as aforesaid, or by him or her, his or her means, kept or detained from the said commissioners, or that cannot make it appear unto the said commissioners, that he or she hath sustained some casual loss, whereby he or she is disabled to pay what he or she then owed, shall or may be indicted for such fraud or abuse at the assizes or general sessions to be holden before the judges of assize, or justices of the peace of the county or place where he or she shall become bankrupt: and if upon such indictment or indictments the bankrupt be thereof convicted, he or she so convicted shall be set upon the pillory in some public place, for the space of two hours, and have one of his or her ears nailed to the pillory and cut off. (3)

The commissioners may break open the bankrupt's doors, &c.

8. And for that some doubt is conceived, whether the commissioners, in case of resistance, have power by the former laws to break open, or cause to be broken open, the house or houses of such bankrupts, which if they have not,

(3) This section seems to be virtually repealed by the 5 Geo. 2, c. 30, sect. 1. which has made it felony without benefit of clergy to conceal effects to the amount of twenty pounds.

the remedies by the former laws given will be to little effect; be it therefore enacted, That in execution of the said ^{Irish Stat. sect. 42.} commission, it shall be lawful to and for the said commissioners or the greater part of them, or any other person or persons, officer or officers, by them, or the greater part of them, to be deputed and appointed by their warrant or warrants, under their hands and seals, to break open the house or houses, chambers, shops, warehouses, doors, trunks, or chests of the said bankrupt, where the said bankrupt, or any of his or her goods or estate shall be, or reputed to be, and to seize upon and order the body, goods, chattels, ready money, and other estate of such bankrupt, as by the said former laws are limited and appointed, whether it be by imprisonment of his or her body, or otherwise, as to the said commissioners, or the greater part of them, shall be thought meet. (4)

(4) The 13 Eliz. c. 7, sect. 2, authorises the commissioners to take at their discretion, order and direction with the money, goods, chattels, &c. wheresoever they may be found or known; and this section to remove doubts declares they may break open, or by their warrant may cause to be broken open the bankrupt's doors. This is a power, which the officers of courts of law do not possess in civil actions. But this authority by the words of the statute is confined to the bankrupt's house and doors. 2 *Show.* 247.

When the messenger had seized the bankrupt's property on board a ship, but was put out of possession, and was threatened to be thrown overboard, the parties offending were ordered by Lord Chancellor Eldon to give security for answering the bankrupt's interest in the cargo. *Ex parte Dixon*, 8 *Ves.* 104.

The 13 Eliz. c. 7, sect. 2, expressly says that the order of the commissioners shall be effectual against all persons, who by joint purchase with the offender have any interest in the premises. These words empower the commissioners to seize all joint property under a separate commission against one partner.

Serjeant Goodinge has observed that if an action of trespass is brought for breaking and entering the house, the defendant must plead the commission and all the special matter.

The bankrupt's goods shall be rateably divided, notwithstanding any judgment, recognizance, &c.

Irish stat. s. 4.

9. And for the better division and distribution of the lands, tenements, hereditaments, goods, chattels, and other estate of such bankrupt, to and amongst his or her creditors, be it enacted, That the commissioners, or the greatest part of them, shall and may examine upon oath, or by any other ways or means, as to them shall seem meet, any person or persons for the finding out and discovery of the truth and certainty of the several debts due and owing to all such creditor and creditors, as shall seek relief, by such course of commission to be sued forth as aforesaid: and that all and every creditor and creditors, having security for his or their several debts, by judgment, statute, recognizance, specialty with penalty or without penalty, or other security, or having no security, or having made attachments, in *London*, or any other place, by virtue of any custom there used, of the goods and chattels of any such bankrupt, whereof there is no execution or extent served and executed upon any the lands, tenements, hereditaments, goods, chattels, and other estate of such bankrupt, before such time as he or she shall or do become bankrupt, shall not be relieved upon any such judgment, statute, recognizance, specialty, attachments, or other security, for any more than a rateable part of their just and due debts, with the other creditors of the said bankrupt, without respect to any such penalty or greater sum contained in any such judgment, statute, recognizance, specialty with penalty, attachment, or other security. (5)

The general plea of not guilty for taking the goods, given by the 1 Jac. 1, c. 15, sect. 16 is confined to what is done under that statute and the 13 Eliz. c. 7, *Goodinge* 174.

(5) By this section the commissioners have a power to examine any person to ascertain the truth and certainty of the debts due from the bankrupt. This authorizes the commissioners to admit the oath and evidence of the party himself claiming the debt. In general that is the only proof. The bankrupt himself may be called to confirm or contradict that proof.

10. And be it further enacted, That if it shall happen, The commissioners may proceed when
any the lands, tenements, goods, chattels, debts, or other

Where there is any doubt, the commissioners must determine as a jury, as well as they are able.

If they reject the proof of the debt the party may petition the chancellor to have it received, or if they admit it against the opinion of the creditors, the assignees may petition the chancellor to have the proof expunged.

The chancellor may order an issue to have it tried at law whether any or what debt is due; that is a power which the commissioners do not possess.

Upon the other part of this important section all the judges of C. B. "held that the clause of the statute was full and plain, that all the creditors of the bankrupt, unless there was a mortgage, should be equally paid."

Sir Geo. Newland v. —, 1 P. Wms. 92, Orlebar v. Fletcher, ibid, 737.

See the 11 and 12 Geo. 3, c. 8. Irish Stat. sect. 4 and 5, where there appears to be some difference with respect to judgments in England and Ireland.

Where goods were sold and a great discount, viz. 33 per cent. was to be allowed, if they were paid for before a certain time, but if not the whole to be charged, the chancellor said "they cannot make the debt more than the real price of the goods." *Ex parte Ainsworth, Cooke 191.*

It seems to be within both the meaning and words of this section; any discount beyond legal interest ought to be disallowed.

So upon all bonds and notes given for more than the debt really due by the express words of this section, a proof cannot be admitted for more than the *just and due debt*. See this subject more fully considered in App. C. 2d Vol.

Lord Eldon has decided that a simple contract debt, against which the statute of limitations might be pleaded in an action at law, cannot be proved under the commission, and of course that it will not enable the creditor to petition for a commission. *Ex parte Dewdney, 15 Ves. 479.*

The writer of these notes having long admitted such proof in his practice as a commissioner, when the reality and existence of the debt was admitted by the bankrupt, he has stated his reasons in Appendix D. in the second volume, for thinking that a commission of bankrupt is not affected by the statute of limitations, 21 Jac. 1. c. 16. passed in the same sessions with this statute, and that all debts by simple contract and specialty of the same duration are placed upon the same footing and equality by this section.

the bankrupt
by fraud makes
himself ac-
countant to
the king.

estate of any bankrupt to be extended, after such time as he or she is become a bankrupt, by any person or persons, under colour or pretence of his or their being an account-ant; or any way indebted unto our Sovereign Lord the King's Majesty, his heirs or successors, that then it shall be lawful to and for the said commissioners to examine upon oath, whether the said debt were due to such debtor or accountant, upon any bargain or contract originally made, betwixt such accountant and the said bankrupt, the said debtor and accountant, and his or their servants: and if such bargain or contract was originally made to and with any other person or persons than the said debtor or accountant, or for the use and trust of any other person or persons, then it shall and may be lawful to and for the said commissioners, or the greater part of them, to order and dispose of all such lands, tenements, hereditaments, goods, chattels, and debts, so extended as aforesaid, to and for the use of the creditors, which shall seek relief by the said commission; and that the order and disposition of the said commissioners, or the greater part of them, shall be good and available against the said extent, and against all persons claiming from, by, or under the said extent; and that such person and persons, to whom the said lands, tenements, goods, and chattels so extended, shall be bargained, sold, granted, or assigned by the commissioners aforesaid, or the greater part of them, shall have good remedy to have, demand, and recover the same against such person and persons who shall detain the same. (6)

Goods in the
possession, &c.
of the bank-
rupt, are liable
to pay his
debts, notwith-
standing any
former grant.

11. And for that it often falls out, that many persons before they become bankrupts, do convey their goods to other men upon good consideration, yet still do keep the same, and are reputed the owners thereof, and dispose the same as their own: be it enacted, That if at any time

(6) This would have been void upon general principles of fraud.

hereafter, any person or persons shall become bankrupt, and at such time as they shall so become bankrupt, shall, by the consent and permission of the true owner and proprietary, have in their possession, order, and disposition, any goods or chattels, whereof they shall be reputed owners, and take upon them the sale, alteration, or disposition, as owners, that in every such case, the said commissioners, or the greater part of them, shall have power to sell and dispose the same, to and for the benefit of the creditors, which shall seek relief by the said commission, as fully as any other part of the estate of the bankrupt. (7) Irish stat. s. 9.

(7) This important section at different times has had different constructions put upon it by the highest authorities who have presided in the courts of law and equity. In 1708 Chief Justice Holt and the court of King's Bench decided that the enacting clause was to be construed by the preamble, and that it was to be confined to goods, which the bankrupt had sold or mortgaged, and of which he continued in possession, and that it did not extend to diamonds or property which the owner deposited in the hands of the bankrupt. *L'Apostre v. Le Plaistrier*, 1 P. Wms. 318. Lord Chancellor Cowper in 1716, said *with some heat that this was a ridiculous notion*, *Copeman v. Gallant*, 1 P. Wms. 314. Yet in 1750, in *Ryall v. Rolle*, 1 Atk. 176. Lord Hardwicke and Ch. Bar. Parker disapproved of the opinion of Lord Cowper, and adopted that of Ch. J. Holt. But in 1774 in *Mace v. Cadell*, Cowp. 232, Lord Mansfield and the court of King's Bench decided agreeably to the opinion of Lord Cowper, and justly observed that the whole would have been nugatory, if it had been confined to the bankrupt's original property, which he had retained in his own hands, for such a grant would have been fraudulent and void, according to the doctrine in *Twine's case*, 3 Co. 81. In *Mace v. Cadell* a woman permitted a man to have the use of furniture her property, and she had falsely declared that the man was her husband. The court held that this woman's property belonged to the assignees of the man, who had become a bankrupt, as he was the reputed owner, and had the disposition of it as owner.

The court there said "this statute does not extend to the case of factors or goldsmith's, who have the pos-

Grant of the
intailed lands
of the bank-
rupt shall be
good.

12. And for the better payment of debts, and discouraging men to become bankrupts, be it further enacted,

“ session of other men’s goods merely as trustees, or under
“ a bare authority, to sell for the use of their principal;
“ but the goods must be such as the party suffers the tra-
“ der to sell as his own.”

It seems to be reasonable that he who lends goods to the bankrupt to support his credit should not be in a better situation than he who lends him money.

This subject has been lately very fully considered in the court of King’s Bench in a case, in which it was decided that this section does not affect the freehold, or any article which is fixed to the freehold or realty; but if utensils of trade were let to a trader at a yearly rent, they would pass to his assignees, unless there had been an usage in the trade for such utensils or articles to be let out to traders, as that might have repelled the presumption of ownership arising from the possession and apparent order and disposition of them. *Horn v. Baker*, 9 East 215. *Ryall v. Rolle*, 1 Atk. 165.

So also if a person rents furniture without the house, they will pass upon his bankruptcy to his assignees, but not where he is in possession of a ready furnished house. *Lingham v. Biggs*, 1 Bos. and Pull. 82.

But property will not pass to the assignees where it is left for a particular special purpose, or of which he has only a temporary custody, as where they have been left in the bankrupt’s warehouse till they could be shipped. *Ex parte Flynn*, 1 Atk. 185.

So where goods were sent to be applied to the payment of particular bills, which had been paid, and the goods were not sold before the bankruptcy, the owner was permitted to recover them. Mr. J. Buller dissented, but the judgment of the rest was affirmed in a court of error. *Tooke v. Hollingworth*, 5 T. R. 215. 2 Hen. Bl. 501.

For when goods or bills are consigned or remitted for a special purpose, it seems to turn the person who receives them into an agent or factor.

The case of a factor has long been an exception to the general words of the statute. Lord Hardwicke has observed that “ contrary to the express words of the statute, “ factors have been excepted out of it for the sake of “ trade and merchandise.” *Ex parte Dumas*, 1 Atk. 234.

The law with respect to factors seems to be fully settled in the case of *Scott v. Surmon*, Willes Rep. 400.

That the said commissioners, or the greater number of them, shall have power by virtue of this act, by deed in-

If a factor has goods in specie at the time of his bankruptcy, they may be all recovered by the owner or consignor against the assignees, if they take possession of them.

If the factor sells them and mixes the money with his own, then the owner or consignor must come in as a creditor under the commission.

But if he has sold them for notes or bills which he has not negotiated before the bankruptcy, then the consignor may recover these notes from the assignees, or the value of them, if they have received the amount of them; that was the point in *Scott v. Surman*.

If the bankrupt as factor had sold goods upon credit, the consignor must receive the debt not his assignees. *Ex parte Murray*, December 1783, *Cooke* 379. The same of course would be true if the factor kept a distinct account with a banker, of the consignor's money, or in every case where the consignor's money was not mixed with his own.

The same law will apply exactly in principle to executors and bankers.

What Lord Mansfield has said of an executor is true of every other person, who has property in autre droit or in right of another, viz. "if an executor becomes bankrupt, the commissioners cannot seize the specific effects of his testator; not even in money which specifically can be distinguished and ascertained to belong to such testator and not to the bankrupt himself." *Howard v. Jemmett*, 3 Burr. 1369.

This applies to the assignee of a bankrupt, who becomes himself a bankrupt.

With respect to bankers, C. J. Eyre has said "I take it to be now settled that bills in the hands of a banker, like goods in the hands of a factor, in the event of a bankruptcy are to be delivered up, subject only to the lien which the banker may have upon them for the balance of his account. On the other hand, it is clear that if indorsed bills are deposited with a banker, and they are negotiated to a third person, though the purpose for which they were deposited should be ever so cruelly disappointed by his becoming bankrupt, the original owner can have no claim to recover them in trover against such third person." *Bolden v. Puller*, 1 Bos. and Pull. 539.

dented and inrolled within six months after the making thereof, in some of his Majesty's courts of record at *Westminster*, to grant, bargain, sell, and convey any manors, lands, tenements, or hereditaments, whereof any bankrupt is or shall be in any ways seized of any estate in tail, in possession, reversion, or remainder, and whereof no reversion or remainder is or shall be in the King's majesty, his heirs or successors, of the gift or provision of his Majesty, his progenitors, his heirs or successors, to any person or persons, for the relief and benefit of the creditors of all such bankrupts; and that all and every such grants, bargains, sales, and conveyances shall be good and available in the law to such person or persons, and their heirs, against the said bankrupts, and against all and the every issues of the body of such bankrupts, and against all and every person and persons, claiming any estate, right, title, or interest, by, from, or under the said bankrupts, after such time as such person shall become bankrupt, and against all and every other person and persons whatsoever, whom the said bankrupt by common recovery, or other ways or means, might cut off or debar from any remainder, reversion, rent, profit, title, or possibility, into or out of any of the said manors, lands, tenements, or hereditaments. (8)

In *Giles v. Perkins*, 9 *East*. 12. The court of King's Bench decided that if a customer paid bills into a banker's, who gave him credit for them as cash, and became bankrupt before they were due, if they were not negotiated the customer might recover them from the banker; and if the assignees receive the money due upon them, the customer may recover it from them, in an action for money had and received, provided the balance of his account was in his favour at the time of the bankruptcy.

And if it were not, it cannot be doubted but he might recover them or the value upon paying the difference against him.

See more upon this subject under the 11 and 12 *Geo.* 3, c. 8. sect. 9, Irish statute.

(8) This section declares that the deed shall be enrol-

13. And be it further enacted, That if any person that now is, or hereafter shall become a bankrupt, have heretofore granted, conveyed, or assured, or shall at any time hereafter grant, convey, or assure any lands, tenements, hereditaments, goods, chattels, or other estate, unto any person or persons, upon condition, or power of redemption at a day to come, by payment of money, or otherwise, that it shall and may be lawful to and for the said commissioners, or the greater part of them, before the time of the performance of such condition, to assign and appoint, under their hands and seals, such person or persons, as they shall think fit, to make tender or payment of money, or other performance, according to the nature of such condition, as fully as the bankrupt might have done, and that the said commissioners, or the greater part of them, shall after such tender, payment or performance, have power to sell and dispose of such lands, tenements, hereditaments, goods, and chattels, and other estates so granted, conveyed, or assured, upon condition to and for the

Conditional estates granted by the bankrupt, may be redeemed by the commissioners.

led within six months after the making. Under the 13 *Eliz. c. 7. sect. 13*, the time for enrolment is not limited, but the assignees or vendees take no interest till the deed is enrolled; for in one case the court said, that "the commissioners may sell by deed enrolled," so without enrolment no sale. *Elliott v. Danby*, 12 *Mod.* 3. *Bennett v. Ganby*, *Carth.* 178.

The deed enrolled of the commissioners has all the operation over the bankrupt's estates tail that a recovery suffered by him would have had, and even greater, for it conveys his estate tail clear of mortgages and incumbrances after his life. For if he mortgages his estate tail, the assignees hold the estate clear of the mortgage after his death. *Beck v. Welsh*, 1 *Wils.* 276. But if the bankrupt has covenanted for further assurance then the assignees must redeem the mortgage. *Pye v. Daubnuz*, 3 *Bro.* 596.

If the original deed is lost, the counterpart cannot be enrolled as the original. *Ex parte Robson*, *Amb.* 180.

benefit of the creditors, as fully as they may sell or dispose of any the estate of the bankrupt. (9)

(9) Lord Hardwicke has said, that " every creditor is to swear whether he has a security or not; if he has a security, and insists upon proving, he must deliver up the security for the benefit of the creditors at large, be they mortgages or pledges." *Exparte Grove*, 1 *Atk.* 104.

But by the former section 11, the mortgagee of any chattel interest can have no benefit, if he is not in possession of the article, or as far possessed of it as the circumstances of the case will admit.

Lord Hardwicke has summed up the whole law upon the subject in a few words: " A mortgage may be made of a ship at sea; and if the mortgagee takes all methods in his power to get the possession, such as bill of sale, &c. it will be out of the statute Jac. 1. c. 19. sect. 11, as was held in *Brown v. Heathcote*, 1 *Atk.* 160; which case was taken notice of by the judges in *Ryal v. Rowles*: otherwise no security could be made of a ship at sea. But the suffering the ship to come back, and go on another voyage made it a very different case from *Brown v. Heathcote*." *Exparte Matthews*, 2 *Ves.* 272.

Mr. J. Grose said, agreeably to the decision of the court, It has been invariably held that the delivery of the grand bill of sale is a delivery of the ship itself. *Atkinson v. Maling*, 2 *T. R.* 462.

The mortgagee in such a case is bound to take possession as soon as the ship arrives in an English port, but he is not bound to take possession in an Irish or foreign port. *Exparte Batson*, 3 *Bro.* 362.

The mortgagee of a share of a ship can only take possession by the transfer of the bill of sale of that share. *Gillespy v. Coats*, *4 Amb.* 652. *Exparte Standgroom*, 1 *Ves. Jun.* 163.

But a bill of sale of a ship at sea, even if the sale is conditional, or a mortgage, is void, unless the certificate of the registry be recited therein by 26 Geo. 3. c. 60. sect. 17. *Rollston v. Hibbert*, 3 *T. R.* 406.

If a trader purchase land, and the purchase money or part of it is unpaid, the vendor has a lien upon the land; and if the purchaser becomes a bankrupt, the vendor must be considered as a mortgagee for the purchase money unpaid. *Chapman v. Tanner*, 1 *Vern.* 267.

And where the bankrupt before bankruptcy had agreed to give a certain sum for an estate in land, the vendor fil-

14. Provided further, That no purchaser, for goods and valuable consideration, shall be impeached by virtue of Commission shall be sued forth within five years.

ed a bill against the assignees, to compel a specific performance, and the chancellor decreed the estate to be sold, and there being a deficiency, the vendor was decreed to prove the deficiency under the bankrupt's estate. *Bowles v. Rogers. Cooke*, 123, 1800.

But where a lease is deposited, or the title deeds, as a security, equity will supply the defect of a conveyance, and in bankruptcy the effect will be the same as if the mortgage had been completed. *Russell v. Russell*, 3 *Ves.* 424.

So also, if bonds are deposited, or bills and notes not indorsed, they must be delivered up to the assignees, if the creditor wishes to prove his whole debt; but they may be redeemed by the assignees, or they may be sold or made the most of, and then the creditor will be admitted to prove the deficiency. *Ex parte Smith, &c. Cooke*, 124. Chancellor's order, *March 8, 1794, post.*

If two independent estates are mortgaged, and one is deficient, and the other affords a surplus, the assignees cannot redeem the one without the other, *Pope v. Onslow*, 2 *Vern.* 286. But Lord Hardwicke doubted, whether this was the rule of the court in *Ex parte King*, 1 *Atk.* 300.

If a mortgage is made, and the mortgagor commits a secret act of bankruptcy, and the mortgagee advances farther sums upon the security of the mortgage, this second mortgage or further advances cannot be tacked to the first, and the assignees may redeem upon payment of the first mortgage only. *Ex parte Herbert*, 13 *Ves.* 183.

But the second mortgage or advance would now be protected and available under the 46 *Geo. 3. c. 135*; if a commission did not issue within two months after it, as a payment to the bankrupt, or a contract or transaction by the bankrupt bona fide made before the party had notice of his act of bankruptcy or insolvency. See 46 *Geo. 3. c. 135. Post.*

Where the estate is deficient, and the mortgagee applies to prove the deficiency, the interest must be calculated only to the date of the commission. *Ex parte Badger*, 4 *Ves.* 165.

But if the estate is sufficient to pay the principal and interest, the assignees cannot redeem without paying the interest to the time of redemption.

Where there is a promissory note to the amount of a debt, and a pledge besides, the pledge must be sold, and a

this act, or any other act heretofore made against bankrupts, unless the commission to prove him or her a bankrupt be sued forth against such bankrupt within five years after he or she shall become a bankrupt. (10)

proof made for the deficiency only. *Ex parte Standgroom*, 1 Ves. Jun. 163.

See Lord Loughborough's order for the commissioners to sell mortgaged premises, March 8, 1794, *post*.

(10) The 13 Eliz. c. 7. sect. 2, having declared, in unequivocal terms, that a trader, from the time he committed an act of bankruptcy was incapable of disposing of his property, or of receiving what before was due to him; this is the second qualification of that incapacity, or as it is called, the relation to the act of bankruptcy. The first was by 1 Jac. 1. c. 15, sect. 14.

Whatever the bankrupt sold, lands, or goods after an act of bankruptcy unknown to the purchaser, might be recovered back by the commissioners or their vendee, and if the purchaser had paid the money, he could not prove his debt under the commission, as he was not a creditor at the time the trader became a bankrupt.

The construction put upon this section is this, viz. if an act of bankruptcy is committed, and then a sale by the bankrupt, and afterwards a commission, if five years have elapsed between the act of bankruptcy and the date of the commission, the intermediate sale or purchase cannot be defeated; if the time is less than five years the property may be recovered by the assignees.

The act of bankruptcy immediately preceding the sale is the one to which the date of the commission must be referred. Acts still more ancient, or acts between the sale and commission, have no operation with respect to this section. *Radford v. Bludworth*, 1 Lev. 13. *Spencer v. Venacre*, 1 Keb. 722.

This section does not take notice of the purchaser's knowledge of the act of bankruptcy, and it might have been supposed, that if the purchaser had given good and valuable consideration, by which the creditors could not have been injured, as the bankrupt's estate would not have been diminished, that the purchaser might have acquired an indefeasible title at the end of five years, after even a known act of bankruptcy; but Lord Hardwicke has decided otherwise, in *Rend v. Ward*, which seems to be reported only in 17 Vin. 119. He says, all the other protections of debtors to, and creditors of, a bankrupt, are

15. Provided further, and be it enacted by the authority aforesaid, That this act, and all other acts of parlia-

Strangers shall take advantage of this and all other laws against bankrupts.

only in cases of secret acts of bankruptcy; and therefore he concludes, that the legislature by this section intended to protect a purchaser only after a secret act of bankruptcy, and not a person who purchased with a knowledge that the seller was a bankrupt; but the 1 Jac. 1. c. 15, *sect.* 14, having qualified the relation to the act of bankruptcy, by declaring that no debtor should be endangered who should pay his debts to the bankrupt before he shall know that he is become a bankrupt, and this being the second qualification, and no mention being made of the knowledge of the act of bankruptcy, it might, I think, with some reason be argued, that it was the intention of the legislature to confirm a purchase made five years after an act perhaps known to all the world. For instance, if a trader lies in prison two months, which is known to all who deal with him, and his creditors, have no wish to petition for a commission for some years, it would be very hard, that at any distance of time all who purchase from him, by giving him full value for his property might be compelled to restore the purchased property or its value, when they could not even receive a dividend upon the money they paid.

It therefore probably was the intention of the legislature that any act of bankruptcy known or secret, after five years was cancelled with a reference to purchases, and that this statute was intended to protect and indemnify purchasers after a notorious act of bankruptcy at the expiration of a certain period; but if this section does not extend to a known act of bankruptcy, then I conceive it will be universally true that no person is protected, who, without compulsion by an action receives from or restores to a trader any property after he has knowledge of an act of bankruptcy.

This section is not repealed by, but is greatly qualified by the 46 Geo. 3. c. 135, which enacts, that all conveyances by, and all transactions by and with any bankrupt, bona fide made more than two calendar months before the date of the commission, shall be valid, notwithstanding any prior act of bankruptcy, provided the party dealing with the bankrupt had not notice of it at the time, or that he was insolvent, or had stopped payment.

A purchaser after a secret act of bankruptcy is now secure, if a commission does not follow within two months

13 & 14 Car. 2. c. 24.

ment heretofore made against bankrupts, shall extend to strangers born, as well aliens as denizens, as effectually as to the natural born subjects, both to make them subject to the laws as bankrupts, as also to make them capable of the benefit of contribution, as creditors by those laws.

(11)

13 & 14 Car. 2. cap. 24.

AN ACT DECLARATORY CONCERNING BANKRUPTS.

Preamble.

WHEREAS divers noblemen, gentlemen, and persons of quality, no ways bred up to trade or merchandize, do oftentimes put in great stocks of money into the *East India* company or *Guiney* company, and the fishing trade, and such other public societies, and receive the proceed of those stocks sometimes in ready monies, sometimes in commodities, which they usually sell for money, or exchange again, by which means the trade of those companies is much encouraged, fishing and navigation increased, and the publick good of the whole kingdom very much advanced.

2. Notwithstanding which great advantage to the publick, there hath been lately some opinion conceived, that such persons may and ought to be made subject to the statutes provided against bankrupts.

3. For the better declaring and explaining the law therein, and to the end such persons may not be discouraged in those honourable endeavours for promoting public undertakings; be it declared and enacted by the king's most excellent majesty, with the advice and assent of the

after the conveyance, &c. but if it does, the purchaser's title will then rest solely upon this section.

(11) This section is intended to repeal so much of the 13 *Eliz. c. 7. s. 1.* and 1 *Jac. 1. c. 15, sect. 1.*, as confined the description of a bankrupt to a *subject born of this realm, or any of the king's dominions or denizen.*

lords spiritual and temporal, and the commons, in this present parliament assembled, and by the authority of the same, That no person or persons whatsoever, who have adventured, or put in, or who hereafter shall adventure, or put in any sum or sums of money in the said *East India* company, or *Guiney* company, or into any joint stock, stocks of money, by them or either of them made or raised, or to be made and raised, for and towards the maintaining and carrying on the trade by the said *East India* company, or *Guiney* company, managed, or to be managed, or who have formerly, or shall hereafter adventure or put in any sum or sums of money into any stock or stocks of money, for the managing and carrying on of the said fishing trade, or the trade now called *The Royal Fishing Trade*, and shall receive and take his or their part or dividend of fish, goods, or merchandises, in *specie*, and shall sell or exchange the same, shall, for or by reason only of such adventure of monies so put into the said *East India* company, or *Guiney* company, or into any stock or stocks for and towards the said fishing trade, or for or by reason only of the receiving and taking such fish, goods, and merchandises in *specie*, or selling for money, or exchanging the same again, be adjudged, taken, esteemed, or reputed a merchant or trader within any statute or statutes for bankrupts, or be liable to the same.

No person for putting in money to the *East India* or *Guiney* company, or fishing trade, shall be esteemed a trader within the statute of bankrupts.

4. Provided always, and it is hereby declared, That every person or persons, who shall trade, traffick, or merchandize in any other way or manner than in the said royal fishing trade, or the trade managed by the said *East India* company, or the *Guiney* company as aforesaid, shall, for and by reason of his and their trading, trafficking, and merchandizing, be liable to commission and commissions against bankrupts, as fully, to all intents and purposes, and not otherwise, as if this act had never been made; any thing in this act to the contrary notwithstanding. (1)

Proviso for other trading.

(1) This refers to their private trading, in respect of

The judgment
concerning
Sir John Wol-
stenholme
made void.

5. And be it further enacted, That a verdict and judgment in replevin heretofore had or given in the term of *Easter*, in the year one thousand six hundred fifty-three, in the king's bench, betwixt *Phineas Andrews*, plaintiff, *Richard Woolward* and *William Meggs*, defendants, whereby Sir *John Wolstenholme*, knight, and adventurer in the said *East India* company, was adjudged and found liable to a commission of bankrupts, only for and by reason of a share he had in the joint stock of the said company, and a pretended selling for money part of the return, which he had in *specie* for his said adventure, shall be, and is hereby declared contrary to law, and is hereby reversed, and made void and null.

Proviso for pur-
chasers in the
case of Sir John
Wolstenholme.

6. Provided always, and be it enacted, That no act, sale, or disposition of any of the lands, tenements, hereditaments goods, chattels, debts, or credits, of the said Sir *John Wolstenholme*, or any distribution of the same, or of any money heretofore made or done by the commissioners of bankrupts, or any claiming under them, or any of them, by virtue or colour of any commission or commissions taken out against the said Sir *John Wolstenholme*, and

which they would without doubt be liable to be made bankrupts. The whole of this statute is declaratory of the former law. It reverses the judgment in the case of Sir *John Wolstenholme* as erroneous. Lord Holt was of opinion, that a member of the Stationer's company as such could not be a bankrupt. *Lord Raym.* 831.

In the 8 & 9 W. 3. c. 20. An act for the incorporation of the governor and company of the Bank of England, there is a clause that no member as such shall be subject to the bankrupt law.

Similar provisions are inserted in many legislative incorporations from abundant caution, in order to remove the apprehensions of those who are inclined to become members.

All corporations are created for the public benefit, as well as for private interest, and from the authority of this statute; I think we may safely conclude that no member of any corporation as such only, can be a bankrupt.

whereof any person or persons is by virtue or colour of or under any such act, sale, or disposition, actually seised or possessed, shall be hereby impeached or frustrated, but that the same be enjoyed for and toward satisfaction of the debts, for which the same have been disposed or distributed.

4 & 5 Annæ, cap. 17. 1705. Expired.

AN ACT TO PREVENT FRAUDS FREQUENTLY COMMIT-
TED BY BANKRUPTS. (1)

WHEREAS many persons have and do daily become Preamble.
bankrupt, not so much by reason of losses and unavoidable

(1) We now come to a new æra in the system of the bankrupt law. No change had been made in that law between the 21 *Jac.* 1623, and the 4 and 5 *Ann.* 1705. But in this the most important alterations were introduced, which with gentle modifications and ameliorations were established by the 5 *Geo.* 2. c. 30. which statute has continued in force till the present time, except as far as it has been lately altered by the 46 *Geo.* 3. c. 135, and the 49 *Geo.* 3. c. 121.

In order to shew fully the history and progress of the bankrupt law, I have thought it proper to insert here the 4 and 5 *Ann.* c. 17. the 5 *Ann.* c. 22., and the 5 *Geo.* 1. c. 24., though they are all expired.

But it will appear from them by what gradual changes the 5 *Geo.* 2. c. 30., and the present system have been formed, and when that statute is ambiguously expressed, they may be found of great service in shewing what was the original intention of the legislature. They will not only gratify curiosity, but will greatly assist in elucidating the subsequent existing statutes.

The student in perusing the decisions of the courts in the several reporters, ought to attend to their dates, and observe what statutes were then in existence, or he will frequently be led into error with respect to the existing law.

C. B. Comyns in his excellent Digest; a work which students and practisers of law frequently consult, has abridged only the statutes of Queen Anne, and his con-

misfortunes, as to the intent to defraud and hinder their creditors of their just debts and duties to them due and owing: for the prevention thereof be it enacted by the Queen's most excellent Majesty, by and with the advice and consent of the lords spiritual and temporal, and commons, in this present parliament assembled, and by the authority of the same, That if any person or persons, who from and after the four and twentieth day of *June*, in the year of our Lord one thousand seven hundred and six, shall become a bankrupt within the several statutes made against bankrupts, or any of them, and against whom a commission of bankrupts, under the great seal of *England*, shall be awarded and issued out, shall not, within thirty days next after notice thereof in writing shall be left at the place of the usual abode of such person or persons, and notice given in the *Gazette*, That such commission or commissions is or are issued forth, and of the time and place of a meeting of the said commissioners, surrender him, her, or themselves to the commissioners named in the said commission, or some of them, and submit to be examined from time to time upon oath, by and before the said commis-

Bankrupt not surrendering upon notice, and submitting to be examined, &c. shall suffer as a felon, without benefit of clergy.

tinuator has not sufficiently pointed out the difference between them and the 5 *Geo. 2. c. 30*.

It had been discovered by experience, that the bankrupt was not influenced by sufficient inducements to surrender his property fairly and honestly to his creditors. He might have been committed to prison, outlawed, and prosecuted for perjury.

But this statute denounces the punishment of death for disobedience and non-compliance, and offers at the same time great rewards for fair and honourable conduct, by giving him a discharge from all his debts existing at the time of his bankruptcy, and also a considerable allowance out of his estate.

The certificate of conformity and allowance to the bankrupt were now for the first time introduced, and with some modifications have continued ever since.

But the changes of the law will be marked under each section with a reference to the existing law, by the 5 *Geo. 2. c. 30*, or by the late statutes.

sioners, or the major part of them, by the said commission authorized, and in all things conform to the several statutes already made concerning bankrupts, and also, upon such examination, fully and truly disclose and discover how, and in what manner, and to whom, and upon what consideration, he, she, or they hath or have disposed, assigned, or transferred any of his, her, or their goods, wares, merchandizes, money, or other effects or estate, and all books, papers, and writings relating thereunto, of which he, she, or they were possessed, or in or to which he, she, or they were any way interested or intituled, or which any person or persons had, or hath, or have had in trust for him, her, or them, or for his, her, or their use, at any time before or after the issuing out of the said commission, and also deliver up unto the said commissioners, or the major part of the commissioners by the said commission authorized, all such part of his, her, or their the said bankrupt's goods wares, merchandizes, effects, and estate, and all books, papers, and writings relating thereunto, as at the time of such examination shall be in his, her, or their possession, custody, or power (his, her, or their, and his, her, and their wives and children's necessary wearing apparel only excepted) then he, she or they, or the said bankrupt, in case of any default or wilful omission therein, or in any the premisses, and being thereof lawfully convicted by indictment or information, shall suffer as a felon, without the benefit of clergy. (2)

(2) Notice to the bankrupt to be left at his usual place of abode, and the advertisement in the Gazette, as now required by 5 Geo. 2. c. 30, were first introduced by this statute.

He must here surrender within thirty days; by the 5 Geo. 2. c. 30., that time is changed into forty-two days.

This introduces the punishment of death for omitting to surrender to, and submitting himself to be examined by, the commissioners, or for concealing any part of his property.

But by the next statute, the 5 Ann. c. 22., and now by

Lord Chancellor may enlarge the time for the bankrupt surrendering.

2. Provided always, and it is hereby declared and enacted by the authority aforesaid, That it shall and may be lawful to and for the lord chancellor, or lord keeper, or commissioners of the great seal of *England*, for the time being, to enlarge the time for such person or persons surrendering him, her, or themselves, and disclosing and discovering his, her, or their estate and effects, as aforesaid, as the lord chancellor, lord keeper, or commissioners, shall think fit, not exceeding sixty days, so as such order for so enlarging the time be made by the said lord chancellor, lord keeper, or commissioners, five days before the time on which such person or persons was or were so to surrender him, her, or themselves, and make such discovery as aforesaid. (3)

Persons refusing to appear, and be examined concerning any act of bankruptcy, &c. the commissioners may commit them to prison, till they submit :

3. And be it further enacted by the authority aforesaid, That if from and after the said four and twentieth day of *June*, a commission of bankrupt, under the great seal of *England*, shall issue forth against any person or persons, that then the commissioners therein named, or the major part of them authorized to put the said commission in execution, shall by virtue hereof, and of the said commission, have full power and authority to send for and call before them, by such process, ways, or means, as they in their discretions shall think convenient, all and every such person and persons as they shall be informed and believe can give any account or information of any act or acts of bankruptcy committed by such person or persons, against whom such commission shall issue forth; and upon their appearance to examine them, and every of them; as well upon their oaths, as otherwise, by such ways and means as the

5 *Geo.* 2. c. 30., the bankrupt cannot be punished with death for concealing property under the value of twenty pounds.

(3) By the 5 *Geo.* 2. c. 30. sect. 3, the time of enlargement is fifty days, and must be made six days before the expiration of the forty-two.

said commissioner, or such major part of them, are by law authorized to examine, touching or concerning such bankrupt's estate, touching any act or acts of bankruptcy committed by such person or persons against whom such commission shall issue forth; and if any person or persons, upon payment or tender, and refusal to accept of such reasonable charge, shall refuse or neglect to come and appear, not having a lawful excuse, to be made known to the said commissioners, and by them allowed, or being come before them, shall refuse to be sworn, or, being of the people called *quakers*, to take the solemn affirmation by law appointed for such people, or being sworn, or having taken such affirmation, shall refuse to answer all such questions, as by the said commissioners shall be put unto him, her, or them, relating to any act of bankruptcy committed by the person or persons against whom such commission is awarded, according to the true intent and meaning of this act, that then it shall and may be lawful for the said commissioners, or such major part of them, to commit to such prison, as to them shall be thought meet, all such person or persons, and also to direct their warrant or warrants to such person or persons, as the said commissioners, or greater part of them, shall think meet, to apprehend and arrest such person or persons as shall so refuse to appear, and to commit such person or persons to such prison, as the said commissioners, or such major part of them, shall think meet, there to remain without bail or mainprize, until such time as such person or persons shall submit him or herself to the said commissioners, and be by them examined, according to the true intent and meaning of this act. Provided, that no person shall be obliged to travel above twenty miles to be so examined. (4)

but none
obliged to tra-
vel above 20
miles.

4. And be it further enacted, by the authority aforesaid, That upon certificate made and granted under the hands

The judges
and justices of
the peace are

(4) See 5 Geo. 2, c. 30. sect. 16, a section similar to this, but not so extensive.

to grant warrants for apprehending and committing such persons.

and seals of the said commissioners, or such major part of them, that such commission is issued forth, and such person or persons proved before them to become bankrupt, that then it shall and may be lawful to and for all or any of the judges of her Majesty's courts of Queen's Bench, common pleas, or court of Exchequer, and to and for all and every the justices of the peace within the kingdom of *England*, dominion of *Wales*, and town of *Berwick upon Tweed* (and they are hereby impowered and required upon application to them for that purpose made) to grant his or their warrant or warrants under his or their hands and seals, as well for the taking and apprehending such person or persons, and him, her, or them to commit to the common gaol of the county, where he, she, or they shall be so taken and apprehended, there to remain, until, he, she, or they shall be thence removed by order of the said commissioners, or such major part of them, by warrant under their hands and seals; and the gaoler or keeper, to whose custody such person or persons shall be committed, is hereby required forthwith to give notice to some one of the said commissioners in the said commission named, of such person or persons being in his or their custody, to the intent the said commissioners may send their warrant to the said gaoler or keeper (which they are hereby impowered and required forthwith to send) for the delivering such bankrupt or bankrupts to the person or persons named in such warrant, and thereby authorized to convey such person to the said commissioners, in order to such examination and discovery as aforesaid, as also to take and seize any the wares, goods, merchandizes, or effects of such person or persons, or any of his, her, or their books, papers, or writings, or any other his or their real or personal estate. (5)

Gaoler to give notice to the commissioners of such persons being in his custody.

Person so apprehended, submitting, &c. to have the same benefit as if he had surrendered.

5. Provided always, and be it enacted by the authority aforesaid, That if such person or persons so apprehended

(5) This is almost *verbatim* the same as 5 *Geo. 2. c. 30*, sect. 14.

and taken, within the said thirty days, shall submit to be examined, and in all things conform, as if he had surrendered himself, as by this act such bankrupt or bankrupts is or are required, then such person or persons, so submitting and conforming, shall have the benefit of this act to all intents and purposes, as if he had voluntarily come in and surrendered himself; any thing herein to the contrary notwithstanding. (6)

6. Provided always, and be it enacted by the authority aforesaid, That if any person or persons shall by reason of this act incur the penalty of felony, that then such felon's goods and estate shall go to, and be divided amongst the creditors seeking relief by such commission; any law, usage, or custom to the contrary in any wise notwithstanding. (7)

Felons goods forfeited by this act, to be divided among creditors.

7. And be it further enacted by the authority aforesaid, That all and every person and persons so becoming bankrupt, as aforesaid, who shall, within the time limited by this act, surrender him, her, or themselves to the major part of the commissioners therein named, and in all things conform as in and by this act is directed, shall be allowed the sum of five pounds *per centum* out of the neat product of all the estate that shall be recovered in and received on such discovery, which shall be paid unto him by the assignee or assignees of the said commissioners, so as the said five pounds *per centum* shall not amount in the whole to above the sum of two hundred pounds, and shall be discharged from all debts, by him, her, or them due and owing at the time that he, she, or they did become bankrupt; and in case any such bankrupt shall afterwards be arrested, prosecuted, or impleaded, for any debt due before such time, as he, she, or they became bankrupt, such bankrupt shall be discharged upon common bail, and shall and may

Persons conforming; to be allowed 5*l.* per cent. out of the estate, so as it amount not to above 200 *l.* and shall be discharged from all debts, &c.

(6) The same as 5 *Geo. 2. c. 30. sect. 15.*

(7) This is adopted by 5 *Geo. 2. c. 30. sect. 1.*

plead in general, that the cause of such action or suit did accrue before such time as he became bankrupt, and may give this act and the special matter in evidence; and if a verdict pass for the defendant, or the plaintiff shall become nonsuited, or judgment be given against the plaintiff, the defendant shall recover his costs, as in other cases. (8)

If the estate produce not 8s. in the pound, the bankrupt shall be allowed only what the assignees and commissioners think fit.

8. Provided always, and it is hereby declared and enacted by the authority aforesaid, That if the neat proceed of such bankrupt's estate, so to be discovered, recovered, and received, together with what shall be otherwise recovered and received, shall not amount to so much as will pay all and every the creditors of such bankrupt the sum of eight shillings in the pound, after all charges had and deducted, that then, and in such case, such bankrupt shall not be allowed the said sum of five pounds *per centum*, of such estate as shall be so recovered in, but shall be allowed and paid by the assignees so much money as the said assignees and the major part of the said commissioners shall think fit to allow to such bankrupt, and no more. (9)

Persons accepting trust, or concealing bankrupt's estate, forfeit 100%. and double the value, to the use of the creditor.

9. And for the better discovery of the said bankrupt's estate, in case he, she, or they shall refuse or neglect to surrender him, her, or themselves, and conform to this act, as aforesaid, be it enacted by the authority aforesaid; That all and every person and persons, who shall have accepted of any trust or trusts, and conceal or protect any estate, either real or personal, of any person becoming bankrupt, as aforesaid; from his, her, or their creditors, and shall not within thirty days next after such commission shall issue forth, and notice thereof given to such person or persons, discover and disclose such trust and estate in writing to

(8) This first introduced an allowance to the bankrupt and a discharge from all his debts, as a reward for conforming with the bankrupt statutes. This is adopted with different limits, by 5 Geo. 2. c. 30. sect. 7.

(9) A similar provision with some modification is in 5 Geo. 2. c. 30. sect. 8.

some one of the commissioners, and submit himself to be examined by the commissioners, or such major part of them, as by the said commission shall be authorized, and truly discover the same, shall forfeit the sum of one hundred pounds, and double the value of the estate, either real or personal, so concealed, to and for the use and benefit of the said creditors, to be recovered by action of debt, in any of her Majesty's courts of record, in the name of the assignees of the said commissioners, in which case costs shall be allowed to either party, as in other common cases. (10)

10. And be it further enacted by the authority aforesaid, Persons discovering bankrupt's estate, to be allowed 3l. per cent. That all and every person and persons, who shall, within sixty days next after the time allowed to such bankrupt to surrender himself and conform as aforesaid, voluntarily come in and make discovery of any part of such bankrupt's estate, before the major part of the said commissioners, shall be allowed the sum of three pounds *per centum*, out of the neat proceed of all that shall be recovered on such discovery, which shall be paid to the person or persons so discovering the same, by the assignee or assignees to whom the same shall be assigned. (11)

11. And be it further enacted by the authority aforesaid, Commissioners and assignees to adjust unbalanced accounts. That where there shall appear to the commissioners, or the major part of them, that there hath been mutual credit given between such person or persons, against whom such commission shall issue forth, and any person or persons, who shall be debtor or debtors to such person or persons, and due proof thereof made, and that the accounts are open and unbalanced, that then it shall be lawful for the commissioners in the said commission named, or the major part of them, or the assignee or assignees of such commission, to adjust the said account, and to take the balance

(10) This with the change of thirty into forty-two days is the same as 5 Geo. 2. c. 30. sect. 21.

(11) The 5 Geo. 2. c. 30. sect. 20. allows five per cent., and is nearly the same.

due in full discharge thereof, and the person debtor to such bankrupt, shall not be compelled or obliged to pay more than shall appear to be due on such balance. (12)

No bankrupt to have any advantage hereof, who had given above 100*l.* in marriage with any of his children, unless, &c.

12. Provided always, and be it enacted by the authority aforesaid, That nothing in this act shall be construed to extend to grant any privilege, benefit, or advantage to any bankrupt whatsoever, against whom a commission under the great seal shall issue forth, who hath, for or upon marriage of any of his or her children, given, advanced, or paid above the value of one hundred pounds, unless he or she shall prove, by his or her books fairly kept, or otherwise, and upon his or her oath, before the major part of the commissioners in such commission named, that he or she had at the time thereof, over and above the value so given, advanced, or paid, remaining in goods, wares, debts, ready money, or other real or personal estate, sufficient to pay and satisfy unto each and every person, to whom he or she was any way indebted, their full and intire debts. (13)

The commissioners to appoint three meetings.

13. Provided always, and be it enacted by the authority aforesaid, That the said commissioners, or the major part of them, shall appoint within the said thirty days, not less than three several meetings for the purposes aforesaid, the last of which shall be on the said thirtieth day hereby limited for such bankrupt's appearance. (14)

General issue.

14. Provided always, and be it hereby enacted by the authority aforesaid, That if any person or persons shall be sued or prosecuted by any action, bill, plaint, or informa-

(12) This most important section is the first that mentions the balance of accounts, though from the first it appears the commissioners only considered the balance to be the debt due to or from the bankrupt. The 5 Geo. 2. c. 30. sect. 28, is nearly the same. See there observations upon it, and a reference to decided cases.

(13) The same as the first part of sect. 12, in the 5 Geo. 2. c. 30.

(14) The same as 5 Geo. 2. c. 30. sect. 2. thirty being changed into forty-two.

tion, for any thing done or to be done by him, her, or them, in prosecution of this act, it shall and may be lawful to and for such person or persons to plead the general issue, and to give this act, and the special matter in evidence. (15)

15. Provided also, and be it enacted by the authority aforesaid, That nothing in this act contained shall extend to give or grant any liberty, privilege, benefit or advantage in this act mentioned, to any person whatsoever, against whom a commission of bankrupts shall be awarded, who shall have lost in any one day the sum or value of five pounds, or in the whole the sum or value of one hundred pounds, within the space or term of twelve months next preceding his or her becoming a bankrupt, in playing at or with cards, dice, tables, tennis, bowls, shovel board, or in or by cock fightings, horse races, dog matches, or foot races or other pastimes, game or games whatsoever, or in or by bearing a share or part in the stakes, wagers, or adventures or in or by betting on the sides or hands of such as do or shall play, act, ride, or run, as aforesaid. (16)

Bankrupt, who has lost at gaming 5*l*. in one day, or 100*l*. in 12 months, to have no advantage of this act.

16. And be it further enacted by the authority aforesaid, That this act shall continue and be in force for the space of three years, and from thence to the end of the next session of parliament, and no longer. (17)

To continue for three years.

17. And for the better encouragement of such persons as already are become bankrupts, to make a true and just discovery of their estates, and to deliver the same up, for

Bankrupt against whom a commission issued before 10 March, 1705, surren-

(15) I do not find that this has been adopted by any of the existing statutes; the power of pleading the general issue in bankruptcy seems to be confined to the commissioners, and to a certain extent only, by the 1 Jac. 1. c. 15. sect. 16. See p. 44. n. 4. ante.

(16) This is copied *verbatim* into 5 Geo. 2. c. 30. sect. 12.

(17) By this section to neglect or to omit to discover any part of his estate made a bankrupt liable to suffer death; this was altered by 5 Ann. c. 22. sect. 1., which fixed the amount of £20. to the concealment, which subjected the bankrupt to the punishment of death, and this is now the limit fixed by the 5 Geo. 2. c. 30. sect. 1.

dering before
24 June, 1706,
shall have the
benefit of this
act.

the use and benefit of their creditors; be it further enacted by the authority aforesaid, That all and every person and persons, who are become bankrupts, and against whom a commission of bankrupt hath issued before the tenth day of *March*, one thousand seven hundred and five, who shall voluntarily, on or before the four and twentieth day of *June*, one thousand seven hundred and six, surrender him, her, or themselves to the commissioners in such commission named, or the major part of them, and submit to be examined from time to time upon oath by and before the said commissioners, or the major part of them, and in all things conform to the several statutes already made concerning bankrupts, and to this present act, shall to all intents and purposes have the benefit of this act. (18)

Persons so sur-
rendering, and
not discovering
their estates, to
suffer as felons,
&c.

18. Provided always, and be it further enacted by the authority aforesaid, That if such person or persons, so voluntarily surrendering him, her, or themselves, shall afterwards neglect or omit to discover and deliver his, her, or their estates and effects, and in every thing act and do as in this act is directed, every such person or persons shall be taken and adjudged to be a fraudulent bankrupt within the true intent and meaning of this act, and thereof being lawfully convicted, shall suffer as a felon without the benefit of clergy. (19)

No discovery
shall intitle a
bankrupt to
the benefit
hereof, unless

19. Provided also, and be it further enacted by the authority aforesaid, That no discovery upon oath to be made by any bankrupt of his or her estate and effects, pursuant

(18) The certificate is here introduced for the first time. It was to be granted by the commissioners only, but to be allowed by the chancellor or by two of the judges as at present, with liberty to the creditors to oppose.

The consent of four parts in five in number and value of the creditors, who had proved their debts, was first required by the next bankrupt statute, 5 *Ann. c. 22. sect. 2.* See observations, and a reference to cases upon the certificate, under the 5 *Geo. 2. c. 30. sect. 10.*

(19) This is repeated in 5 *Geo. 2. c. 30. sect. 42.*

to this act, shall intitle such bankrupt to the benefits allowed by this act, unless the commissioners of bankrupt or the greater part of them that shall be named in the commission issued, or to be issued, against him or her, shall in writing under their hands and seals, certify to the lord chancellor of *England*, lord keeper or commissioners, for the custody of the great seal of *England* for the time being, that such bankrupt hath made discovery of his estate and effects, and in all things conformed himself according to the directions of this act, and that there doth not appear to them any reason to doubt of the truth of such discovery, or that the same is not a full discovery of all such bankrupt's estate and effects; and unless such certificate shall be allowed and confirmed by the lord chancellor, lord keeper, or commissioners for the custody of the great seal of *England* for the time being, or by such two of the judge, of the courts of Queen's Bench, common pleas, and court of Exchequer at *Westminster*, to whom the consideration of such certificate shall be referred by the lord chancellor, lord keeper, or commissioners for the custody of the great seal of *England* for the time being: and the creditors of such bankrupts are to be allowed to be heard, if they shall think fit, before the respective persons aforesaid, against the making such certificate, and against the confirmation thereof. *Vide 5 Annæ, cap. 22. sect. 1.*

And whereas commissions of bankrupts have been often executed with great expence in eating and drinking at the meeting of the commissioners, or some of them, therein named, to the great prejudice of the bankrupts and their creditors; be it further enacted by the authority aforesaid, That there shall not be paid or allowed by the creditors, or out of the estate of the bankrupts, any monies whatsoever for expences in eating or drinking of the commissioners, or of any other persons at the times of the meetings of the said commissioners, or of any of the creditors, or others, in order to execute or prepare matters for the execution of this act, unless the commissioners certify that he hath conformed, &c. nor unless such certificate be allowed; and the creditors may be heard against it.

Nothing to be allowed for the eating or drinking of the commissioners; and any commissioner ordering such expence shall be for ever disabled, &c.

cution of such commission; and if any person or persons named, or to be named, as a commissioner or commissioners in any such commission, shall order any such expence to be made, or eat or drink at any such meeting, at the charge of the creditors, or out of the estate of such bankrupts, every such commissioner, so offending, shall be disabled for ever after to act as a commissioner in such or any other commission founded on the statutes made against bankrupts.

Continued by 7 Annæ, cap. 25. Et vide 10 Annæ, cap. 15. EXP.

5 Annæ, Cap. 22. 1706. Expired.

AN ACT TO EXPLAIN AND AMEND AN ACT OF THE LAST SESSION OF PARLIAMENT, FOR PREVENTING FRAUDS FREQUENTLY COMMITTED BY BANKRUPTS.

Preamble.

WHEREAS an act made in the first session of this present parliament, held in the fourth and fifth years of her Majesty's reign, intituled, *an act for preventing frauds frequently committed by bankrupts*, hath not answered the good intent thereof; but, on the contrary, many notorious frauds and abuses have been committed, notwithstanding the provisions and penalties in the said act: For prevention whereof for the future, and for explaining and amending the said late act, be it enacted by the Queen's most excellent Majesty, by and with the advice and consent of the lords spiritual and temporal, and commons, in this present parliament assembled, and by the authority of the same, That if any person or persons who shall become bankrupt within theseveral statutes made against bankrupts, or any of them, or any other person or persons, by or with his, her or their order, consent, or privity, shall from and after the five and twentieth day of *April*, in the year of our Lord one thou-

Bankrupts, or any others with their privity, removing, concealing, &c. any goods, wares, &c. to the value of 20l shall suffer as

and seven hundred and seven, remove, carry away, conceal, destroy, or imbezzle any of the goods, wares, merchandizes, monies, or effects, whereof he, she, or they or any person or persons in trust for him, her, or them, is or are possessed or intitled, unto the value of twenty pounds or upwards, or any books of accompts, bonds, bills, notes, papers, or writings relating thereunto, with intent to defraud his, her, or their creditors, every such person and persons so becoming bankrupt, and being thereof lawfully convicted, shall suffer as a felon without benefit of clergy; and in such case such bankrupt's goods and estate shall go to and be divided among the creditors; any law, usage, or custom to the contrary notwithstanding. (1)

2. And be it further enacted by the authority aforesaid, That from and after the said five and twentieth day of *April*, in the year of our Lord one thousand seven hundred and seven, no person or persons that have, or hath, or shall become bankrupts, shall be discharged from all or any of his, her, or their debts owing at the time of such bankruptcy, or be intitled to any allowance or benefit given or provided by the said late act of parliament, made in the fourth and fifth years of her now Majesty's reign, unless the allowance thereby given, and the certificate by the said act directed to be made and confirmed, shall be first signed by four parts in five in number and value of the creditors of such bankrupts, who shall have duly proved their debts, or some others by them authorized thereunto, testifying their consent to such allowance and certificate

felons, and their estate be divided among their creditors.

No bankrupt shall be discharged by 4 & 5 Anne, c. 17, unless the allowance and certificate be confirmed by four parts in five in number and value of the creditors.

(1) The statute passed in the preceding sessions, which had introduced so great changes in the bankrupt system, had made it felony without benefit of clergy, for a bankrupt not to surrender himself and submit to be examined, or to conceal any part of his property by sect. 1 and 18.

This section makes it a capital crime only when the concealment is to the amount of £20 or upwards. That limit was adopted by 5 Geo. 2. c. 30. sect. 1. the existing statute.

(saving and excepting only such allowances and certificates, which have been already made and granted, according to the true intent and meaning of the said late act, which shall be good and effectual in the same manner, and no other, as if this present act had not been made) any thing in the said late act, or herein contained, to the contrary notwithstanding. (2)

All securities given by a bankrupt to a creditor to induce him to sign such certificate shall be void.

3. Provided always, and be it enacted by the authority aforesaid, That every bond, bill, note, contract, agreement, or other security whatsoever, to be made or given by any bankrupt, or by any other person for him, unto or to the use of, or in trust for any creditor or creditors, or for securing the payment of any debt or sum of money due from such bankrupt, at the time of his becoming bankrupt, or any part thereof, between the time of his becoming a bankrupt and the time of such bankrupt's discharge, as a consideration, or to the intent to induce or persuade him or her to consent to or sign any such allowance or certificate, shall be wholly void and of no effect; and the monies thereby secured or agreed to be paid, shall not be recovered or recoverable; any thing herein contained, or any law, custom, or usage to the contrary notwithstanding. (3)

The commissioners shall give notice of any commission in the Ga-

4. And be it further enacted by the authority aforesaid, That where any commission of bankrupts shall issue out from and after the said five and twentieth day of *April*, in

(2) The last statute directed that the certificate should be signed by the commissioners only, but this introduced the subscription of four parts in five in number and value of the creditors, who have proved their debts.

This was afterwards adopted by the 5 Geo. 2. c. 30. sect. 10.

By that statute no creditor is allowed to sign, whose debt does not amount to £20, and some other modifications are there introduced.

(3) This almost *verbatim* is adopted by 5 Geo. 2. c. 30. sect. 11.

theyear of our Lord one thousand seven hundred and seven, zelle, and ap-
 the commissioners therein named, or the major part of point time
 them, shall forthwith cause notice thereof to be given in and place for
 the *Gazette*, and shall appoint a time and place for the cre- the creditors
 ditors to meet, which meeting for the city of *London*, and to meet and
 all places within the bills of mortality, shall be at the choose assign-
Guildhall of the said city, in order to choose assignee or ees, who shall
 assignees of the bankrupt's estate; and the said commis- keep books of
 sioners, or the major part of them, shall assign every such the bankrupt's
 bankrupt's estate and effects unto such person or persons estate.
 only, and no other, as shall be nominated and chosen by
 the major part of the creditors then present; and the as-
 signee or assignees so chosen shall be obliged to keep books
 of the account of the bankrupt's estate, with liberty for
 any of the creditors to resort to and inspect them. (4)

5. Provided always, That it shall and may be lawful The commis-
 for the said commissioners, or the major part of them, as sioners may
 often as they shall see cause, for the better preserving or make assignees
 securing the bankrupt's estate, immediately to appoint and removeable at
 make one or more assignee or assignees of the said estate, the meeting of
 or any part thereof; which assignee or assignees, or any the creditors,
 of them, shall or may be removed or displaced at the said if they think
 meeting of the creditors, if the major part of them then fit; which as-
signees refus-
ing to deliver
the estate, &c.
to the assignees
chosen by the

(4) The 1 *Jac.* 1. c. 15. *sect.* 13., empowered the com-
 missioners to assign a debt due to the bankrupt, and the
 13 *Eliz.* c. 7, empowered them to sell the bankrupt's es-
 tate. All the assignees of the bankrupt, or more properly
 of the commissioners, till this section were under the
 authority of those statutes only. The choice of the as-
 signees by the creditors is now first introduced, "to whom
 only the commissioners shall assign every such bank-
 rupt's estate and effects."

This made a most important alteration. The creditors
 here shall chuse by a majority in number. This choice of
 assignees is adopted by 5 *Geo.* 2. c. 30. *sect.* 26, 27; but
 there the choice must be made by a majority in value only,
 and no creditor votes in the choice whose debt is less
 than £10.

creditors, shall
forfeit 100l.
to be divided
among the
creditors.

present shall so think fit; and such assignee or assignees, as shall be so removed or displaced shall deliver up and assign all the effects and estate of the bankrupt, which before that time shall have come to his, her, or their hands or possession, or shall have been assigned to him, her, or them, unto such other assignee or assignees, as shall be chosen by the said major part of the creditors present at such meeting; and the effects and estate of the bankrupt, which shall be so delivered up or assigned, shall be to all intents and purposes as effectually vested in such new assignee or assignees, as if the first assignment had been made to him, her, or them, by the said commissioners; and if any of the said first assignees shall refuse or neglect by the space of fourteen days next after notice given of the choice of such new assignee or assignees, and of his, her, or their consent to accept such assignment, signified to the first assignee or assignees, by writing under his, her, or their hands, to make such assignment and delivery, as aforesaid, every such first assignee or assignees shall respectively forfeit the sum of one hundred pounds, over and above the value of such money, goods, and effects, that came to his or their hand respectively by virtue of such assignment, to be divided and distributed among the creditors, as the bankrupt's estate is or ought to be, and to be recovered by action of debt, bill, plaint, or information, in any of her majesty's courts of record at *Westminster*, by such person or persons, as the said major part of the creditors shall appoint to sue for the same, with full costs of suit, wherein no privilege, protection, or wager of law, or more than one imparlance shall be allowed; any law, custom, or usage to the contrary notwithstanding. (5)

(5) This section for the first time introduces temporary, or as they are now generally called, provisional assignees. This is adopted by 5 *Geo. 2. c. 30. sect. 30.* with some modifications.

6. And be it also further enacted by the authority ^{Assignees may compound with debtors to the bankrupt.} aforesaid, That such assignee or assignees so to be chosen as aforesaid, or the major part of them, shall be, and are hereby impowered to make compositions with any person debtor or accomptant to such bankrupt, where the same shall appear necessary and reasonable, and to take such reasonable part, as can upon such composition be gotten, in full discharge of such debts or accounts; any law, custom, or usage to the contrary notwithstanding. (6)

7. And for preventing the taking out commissions of bankrupt fraudulently or maliciously, be it further enacted by the authority aforesaid, That no commission of bankrupts under the great seal of *England*, shall, after the five and twentieth day of *April*, in the year of our Lord one thousand seven hundred and seven, be awarded or issued out against any person whatsoever, at the instance or upon the petition of any one or more creditor or creditors, unless the single debt of such creditor do amount to the sum of one hundred pounds or upwards, or unless the debt of two creditors so petitioning, as aforesaid, shall amount to one hundred and fifty pounds and upwards, or unless the debt of three or more creditors so petitioning, as aforesaid, shall amount to two hundred pounds and upwards: And the creditor or creditors petitioning for such commission, shall before the same be granted, give bond to the lord chancellor, lord keeper, or commissioners of the great seal for the time being in the penalty of two hundred pounds, to be conditioned for proving his, her, or their debts, and also for proving the party a bankrupt at the time of taking out such commission: And if such debt or debts shall not be really due and owing, or if after such commission taken out, it cannot be proved that the party

No commission shall issue, unless the debt of one petitioning creditor amount to 100*l.* or two to 150*l.* or three to 200*l.* The petitioning creditors to give bond, &c.

(6) The assignees with the consent of the major part in value of the creditors present at a public meeting held for the purpose, have now the same power by 5 *Geo. 2. c. 30, sect. 35.*

was a bankrupt at the time, but on the contrary it shall appear, that such commission was taken out fraudulently or maliciously, that then the lord chancellor, lord keeper, or commissioners of the great seal, for the time being, shall and may, upon petition of the party or parties grieved, assign such bond to recompense him, her, or them, in damages; any law, custom, or usage, to the contrary notwithstanding. (7)

No farmer,
grazier, &c.
entitled to the
benefit hereof,
by of 4 & 5
Anne, c. 17.

8. Provided always, and it is hereby further declared and enacted by the authority aforesaid, That no farmer, grazier, or drover of cattle, or any person who is or hath been a receiver general of taxes granted by parliament, shall be entitled to any of the benefits given by this or the said late act made in the fourth and fifth years of her majesty's reign, or be deemed a bankrupt within the same, or any former acts made against bankrupts; any law, custom, or usage, to the contrary notwithstanding. (8)

To continue
for two years.

9. And be it further enacted by the authority aforesaid, That this act shall continue and be in force for the space of two years, and from thence to the end of the next session of parliament, and no longer.

(7) This is adopted by the 5 Geo. 2. c. 30. sect. 23. See there observations, and a reference to cases.

(8) This is verbatim the same as 5 Geo. 2. c. 30. sect. 40. See there observations, and a reference to cases.

10 Ann. c. 15. 1711.

AN ACT FOR REPEALING A CLAUSE IN THE STATUTE MADE IN THE TWENTY-FIRST YEAR OF THE REIGN OF KING JAMES THE FIRST, INTITULED, AN ACT FOR THE FURTHER DESCRIPTION OF A BANKRUPT, AND RELIEF OF CREDITORS AGAINST SUCH AS SHALL BECOME BANKRUPTS, AND FOR INFLICTING CORPORAL PUNISHMENT UPON THE BANKRUPTS, IN SOME SPECIAL CASES, WHICH MAKES DESCRIPTIONS OF BANKRUPTS; AND FOR THE EXPLANATION OF THE LAWS RELATING TO BANKRUPTCY, IN CASE OF PARTNERSHIP.

WHEREAS by an act made in the one and twentieth Preamble. year of the reign of King *James* the first, intituled, *An act for the further description of a bankrupt, and relief of creditors against such as shall become bankrupts, and for inflicting corporal punishment upon the bankrupts, in some special cases*; it is amongst other things enacted, That all and every person or persons using, or that shall use the trade of merchandize, by way of bargaining, exchange, bartering, chevisance, or otherwise in gross or by retail, or seeking his or her living by buying and selling, or that should use the trade or profession of a scrivener, receiving other men's monies or estates into his trust or custody, who at any time after the end of the said session of parliament, being indebted to any person or persons in the sum of one hundred pounds or more, should not pay or otherwise compound for the same within six months next after the same should grow due, and the debtor be arrested for the same, or within six months after an original writ sued out to recover the said debt, and notice thereof given unto him, or left in writing at his or their dwelling house or last place of abode, or being arrested for the sum of one hundred pounds or more of just debt

After April 20, 1712, the recited act, &c. so far as relates to the description of a bankrupt repealed.

or debts, should, at any time after such arrest, procure his enlargement by putting in common or hired bail, should be accounted and adjudged a bankrupt to all intents and purposes, and in the said cases of arrest, or getting forth by common or hired bail, from the time of his or her said first arrest: and whereas it is found by experience, that many and great mischiefs and inconveniences have happened, especially of late, to trade and credit in general, by reason of the said descriptions of a bankrupt: for remedy thereof for the future, be it enacted by the queen's most excellent majesty, by and with the advice and consent of the lords spiritual and temporal, and commons, in this present parliament assembled, and by authority of the same, That the said act, and also all and every other act and acts of parliament whatsoever, so far forth as they relate to the said descriptions of a bankrupt, be from and after the twentieth day of *April*, in the year of our Lord one thousand seven hundred and twelve, repealed and made void; and that no person or persons whatsoever, within the said descriptions, or any of them, shall, from and after the said twentieth day of *April*, for or by reason of the same, be taken or adjudged to be within the statute or statutes of bankrupt whatsoever. (1)

Not to frustrate any act, sale, &c. of the estates of such persons by any commission taken out before the said 20th of April, 4 Ann. c. 17.

2. Provided nevertheless, and be it enacted by the authority aforesaid, That no act, sale or disposition of any the estate of such persons within the said descriptions, or any distribution of the same, by or under any commission or commissions of bankruptcy, before the said twentieth day of *April* taken out against such person or persons, shall be hereby impeached or frustrated, but that the same shall be enjoyed for and towards satisfaction of the

(1) The object of this section is to remove some of the acts of bankruptcy introduced by the 21 *Jac. c. 19. sect. 1*. See p. 39. n. (1.) how much of the first section of 21 *Jac. c. 19*, remains unrepealed.

debts, for which the same have been disposed or distributed. (2)

3. And whereas a doubt has arisen upon an act made in the fourth year of her majesty's reign, intituled, *An act to prevent frauds frequently committed by bankrupts*, whether the discharge of a bankrupt, by virtue of that act, should be construed to discharge the partners of such bankrupt from the same debt; be it therefore further enacted and declared by the authority aforesaid, That by the discharge of any bankrupt or bankrupts, by force of the said act, or any other acts relating to bankrupts, from the debts by him, her, or them due and owing, at the time that he, she, or they did become a bankrupt, shall not be construed, nor was meant or intended to release or discharge any other person or persons, who was or were partner or partners with the said bankrupt in trade, at the time he, she, or they became a bankrupt, or then stood jointly bound, or had made any joint contract together with such bankrupt or bankrupts, for the same debt or debts, from which he was discharged, as aforesaid, but that notwithstanding such discharge, such partner and partners, joint obligor and obligors, and joint contractors with such bankrupt and bankrupts, as aforesaid, shall be and stand chargeable with, and liable to pay such debt and debts, and to perform such contracts, as if the said bankrupt and bankrupts had never been discharged from the same.

By the discharge of a bankrupt, his partner shall not be discharged.

Irish stat. sec 62.

(2) There is one circumstance remarkable in this section, viz. that it refers to a discharge by a certificate introduced by the 4 and 5 Ann. c. 17, and 5 Ann. c. 22, both of which are expired.

It can, therefore, have no operation, unless the words "the discharge of any bankrupt by force of the said act, or any other acts relating to bankrupts," can be construed to extend to a subsequent statute the 5 Geo. 2. c. 30.

But the discharge of the partner, who is not a bankrupt will discharge the bankrupt: and, in general, if a

Anno 5 Georgii. Cap. 24. 1718. Expired.

AN ACT FOR THE BETTER PREVENTING FRAUDS COMMITTED BY BANKRUPTS.

WHEREAS commissions of bankrupts were issued against several persons, not long before the expiration of the several statutes made in her late Majesty's reign, for preventing frauds frequently committed by bankrupts, and such persons have been declared bankrupts by the commissioners by such commissions authorized; and yet such bankrupts, by reason of the expiration of the said statutes, have not only refused to surrender themselves to the commissioners, and to discover and deliver up their estate and effects to the said commissioners, for the benefit of their creditors, but have carried away and concealed the same, in such manner, that the said commissioners have not been able to seize the same, to the manifest wrong and injury of their creditors, and to the great discouragement of trade: And whereas many evil-minded persons have, since the expiration of the said statutes, bought and taken up on trust and credit divers great quantities of goods, wares and merchandizes, and have thereby and otherwise contracted great debts; and having gotten such goods and effects into their custody, have sold the same for less than the value thereof, and thereby raised ready money, and have withdrawn themselves from their usual places of abode with their effects, into the *Mint*, and other secret or pretended privileged places,

creditor takes a composition in discharge of the debt from the co-obligor, principal or surety, or from any party upon a bill without the consent of the others who are liable, they are discharged, and if a proof is made under their commissions it must be expunged. *Ex parte Smith*, 3 Bro. 1. *Ex parte Smith and others*, Cooke, 171. *Ex parte Gifford*, 6 Ves. 805.

in order to oblige their creditors to accept of such composition for their respective debts, as such evil-minded persons think fit to give: or have carried away their effects beyond the seas, whereby their creditors have been totally deprived of their debts: And whereas many persons have and do daily become bankrupt, not so much by reason of losses and unavoidable misfortunes, as to the intent to oblige their creditors to accept such their unjust proffers and composition, and to defraud and hinder their creditors of their just debts; be it therefore enacted by the king's most excellent majesty, by and with the advice and consent of the lords spiritual and temporal, and commons, in this present parliament assembled, and by the authority of the same, That if any person or persons who, since the six and twentieth day of *May*, which was in the year of our Lord one thousand seven hundred and sixteen, became bankrupt, or which shall at any time hereafter, during the continuance of this act, become bankrupt within the several statutes made and now in force concerning bankrupts or any of them, and against whom a commission of bankrupt, under the great seal of *Great Britain*, hath, since the said six and twentieth day of *May*, which was in the year of our Lord one thousand seven hundred and sixteen, been awarded and issued out, or shall at any time hereafter be awarded and issued out, whereupon the person or persons, against whom such commission issued, hath or have been, or shall be declared a bankrupt or bankrupts, shall not, within thirty days after notice thereof in writing shall be left at the usual place of abode of such person or persons, and notice given in the *London Gazette*, that such commission or commissions, is, are, or have been issued forth, and of the time and place of a meeting of the said commissioners, surrender him, her, or themselves to the commissioners named in the said commission, or some of them, and submit to be examined, from time to time, upon oath, or,

Persons against whom a commission of bankrupt has or shall issue after *May* 26, 1716, not surrendering in 30 days after notice, and submitting to be examined, &c. shall be adjudged felons.

5 Geo. 1. c. 24. 1718. Expired.

being one of the people called *Quakers*, upon the solemn affirmation by law appointed for such people, by and before such commissioners, or the major part of them, by such commission authorized, and in all things conform to the several statutes already made concerning bankrupts: and also upon such his, her, or their examination, fully and truly disclose and discover how and in what manner, and to whom and upon what consideration, he, she, or they hath or have disposed, assigned, or transferred any of his, her, or their goods, wares, merchandizes, money, or other effects, or estate, and all books, papers, and writings relating thereunto, of which he, she, or they were possessed, or in or to which he, she, or they were any ways interested or intitled, or which any person or persons had or hath, or have had in trust for him, her, or them, or for his, her, or their use, at any time before or after the issuing out of the said commission; and also deliver up unto the said commissioners by the said commission authorized, or the major part of them, all such part of his, her, or their,* the said bankrupt's goods, wares, merchandizes, money, effects, or estate, and all books, papers, and writings relating thereunto, as at the time of such examination shall be in his, her, or their possession, custody, or power (his, her, or their necessary wearing apparel, and the necessary wearing apparel of the wife or children of such bankrupt, only excepted) then he, she, or they, the said bankrupt or bankrupts, in case of any default or wilful omission therein, or of any of the premises, and (being thereof lawfully convicted by indictment or information) shall be deemed and adjudged to be a felon, and shall suffer as a felon without the benefit of clergy, or the benefit of any statute made in relation to felons. And it is hereby declared, That the person or persons of such bankrupt shall not be liable to any arrest for debt, or escape warrant, in going to, staying with, or coming from the said commissioners, in case such bank-

The person of such bankrupt shall not be liable to any arrest.

rupt shall attend the said commissioners, in obedience to any notice or summons from them; but (on his producing such summons or notice, under the hands of the said commissioners, to the officer who shall arrest him, her, or them, and making it appear to such officer that such notice or summons is signed by the said commissioners, or the major part of them, and giving such officer a copy thereof) shall be immediately discharged; and in case any officer shall detain such bankrupt or bankrupts (after he, she, or they shall have shewn such notice or summons to him as aforesaid) in his custody, such officer shall forfeit and pay to such bankrupt for his own use, the sum of five pounds for every day such officer shall detain such bankrupt; to be recovered by action of debt in any of his majesty's courts of law at *Westminster*, in the name or names of such bankrupt or bankrupts, with costs of suit. (1)

2. Provided always, and it is hereby declared and enacted by the authority aforesaid, That it shall and may be lawful to and for the lord chancellor, lord keeper or commissioners for the custody of the great seal of *Great Britain* for the time being, to enlarge the time for such per-

Officer detain-
ing such bank-
rupt to forfeit
to him 5*l.* per
diem.

Chancellor
may enlarge
the time for

(1) This statute is expired, but it is of great importance to shew the progress of the bankrupt system. It has incorporated the great alterations introduced by the 4 & 5 *Ann.* c. 17, and the 5 *Ann.* c. 22, and has made great additions to them.

The conclusion of this section is worthy of observation. It is the first statute that gave the bankrupt any protection from arrest, and that only to a very limited extent, viz. *Eundo, morando et redeundo*, or, in the words of the statute, *in going to, staying with, or coming from, the commissioners in obedience to their summons*. So that the bankrupt was not even protected the whole of that day. If this had been adverted to in the case of *Ex parte Woods*, 11 T. 1811, the writer of this cannot but think the decision would have been different. See observations upon the present protection of the bankrupt from arrest 5 Geo. 2. c. 30. sect. 5.

persons surren-
dering them-
selves, not ex-
ceeding 60
days.

son or persons surrendering him, her, or themselves, and disclosing and discovering his, her, or their estate and effects, as aforesaid, as the lord chancellor, lord keeper, or such commissioners, shall think fit, not exceeding sixty days, to be computed from the end of the said thirty days, so as such order for enlarging the time be made by the lord chancellor, lord keeper, or such commissioners, five days at the least before the time, on which such person or persons was or were so to surrender him, her, or themselves, and make such discovery as aforesaid. (2)

Bankrupts, or
other persons
by their order,
&c. removing,
concealing,
&c. any
goods, &c.
to the value of
20*l*. shall suffer
as felons,
without bene-
fit of clergy.

3. And be it further enacted by the authority aforesaid, That if any person or persons, who, since the said six and twentieth day of *May*, which was in the year of our Lord one thousand seven hundred and sixteen, hath or have, or at any time hereafter shall become bankrupt, within the several statutes made and now in force concerning bankrupts, or any of them, or any other person or persons, by or with his, her, or their order, consent, or privity, who shall, from and after the five and twentieth day of *April*, which shall be in the year of our Lord one thousand seven hundred and nineteen, remove, carry away, conceal, destroy, or embezel any of the goods, wares, merchandizes, monies, or effects, whereof he, she, or they, or any person or persons in trust for him, her, or them, was or were possessed or intitled to, at or after the time of his, her, or their becoming bankrupt, or during the time of his, her, or their continuing bankrupt, unto the value of twenty pounds, or upwards, or any books of accounts, bonds, bills, notes, papers, or writings relating thereunto, with intent to defraud his, her, or their creditors, every such person and persons so become, or to become bankrupt, as aforesaid, and being thereof lawfully convicted, shall be deemed, declared,

(2) This is the same as *sect. 3. of 5 Geo. 2. c. 30.* except that 60, 30, and 5 are respectively changed into 50, 42, and 6.

and adjudged to be, and shall suffer as a felon without the benefit of clergy, or the benefit of any statute made in relation to felons; and in such case such felon's goods and estate shall go to and be divided among the creditors seeking relief under such commission; any law, usage, or custom to the contrary thereof in any wise notwithstanding. (3)

And such felons goods to be divided among the creditors.

4. And be it further enacted by the authority aforesaid, That upon certificate made under the hands and seals of the commissioners, by such commission authorized, or to be authorized, that such commission is issued forth, and such person or persons proved before them to become bankrupt or bankrupts, it shall and may be lawful to and for all or any of the judges of his majesty's courts of king's bench, common pleas, or court of exchequer, and to and for all and every the justices of the peace within that part of the kingdom of *Great Britain* called *England*, the dominion of *Wales*, and town of *Berwick upon Tweed* (and they are hereby impowered and required, upon application to them for that purpose made) to grant his or their warrant or warrants under his or their hands and seals, as well for the taking and apprehending such person or persons, and him, her, and them to commit to the common gaol of the county, where he, she, or they shall be so apprehended and taken, there to remain, until he, she, or they be removed by order of the said commissioners, or the major part of them, by warrant under their hands and seals; and the gaoler or keeper, to whose custody such person or persons shall be committed, is hereby required to take and receive such person into his custody, and forthwith to give notice to some or one of the said commissioners in the said commission named, of such person or persons being in his or their custody; to the intent the said commissioners may send their warrant to such gaoler or keeper

Upon certificate of the commissioners of any person's being proved a bankrupt, the judges and justices of peace shall grant their warrant for apprehending him, and commit him to the common gaol.

Gaoler to give notice to the commissioners who may send their warrant for the bringing such person to them.

(3) This is adopted by 5 Geo. 2. c. 30. sect. 1.

Commissioners
may grant
warrants to
seize the
goods, &c.
of bankrupts.

(which they are hereby impowered and required forthwith to send) for the delivering such bankrupt or bankrupts to the person or persons named in such warrant, who shall be thereby authorized to convey and bring such person or persons to the said commissioners, in order to such examination and discovery as aforesaid; and the said commissioners are hereby likewise authorized and impowered, by such their warrant, or any other warrant, to take and seize any the goods, wares, merchandizes, and effects of such bankrupt or bankrupts (the necessary wearing apparel of such bankrupt, or of his wife, or children, only excepted) and any of his, her, or their books, papers, or writings, which shall be then in the custody or possession of such bankrupt or bankrupts, or of any other person, or in any prison or prisons whatsoever; any custom or usage to the contrary in any wise notwithstanding. (4)

Persons so taken, and submitting to be examined, shall have the benefit of this act.

5. Provided always, and be it enacted by the authority aforesaid, That if any such person or persons, so apprehended and taken, shall, within the time or times allowed by this act for that purpose, submit to be examined, and in all things conform, as if he, she, or they had surrendered, as by this act such bankrupt or bankrupts is or are required, that then such persons so submitting and conforming, shall have and receive the benefit of this act to all intents and purposes, as if he, she, or they had voluntarily come in and surrendered himself, herself, or themselves; any thing herein contained to the contrary thereof in any wise notwithstanding. (5)

Commissioners
may send for
persons, and
examine them.

6. And be it further enacted by the authority aforesaid, That it shall and may be lawful for the commissioners named in, and authorized by, any commission of bankrupts, which already is, or hereafter shall be issued against

(4) This is *verbatim* the same as 5 Ann. c. 17. sect. 4. and 5 Geo. 2. c. 3. sect. 14. the existing statute.

(5) This is *verbatim* the same as 5 Geo. 2. c. 30. sect. 15.

any person or persons, to send for and call before them, by such warrant, summons, ways, or means, as they in their discretions shall think fit, all and every such person and persons as they shall be informed and believe can give any account or information of any act or acts of bankruptcy committed by such person or persons, against whom any commission now is, or hereafter shall be awarded and issued out; and upon their appearance to examine them, and every of them, as well upon their oaths, as otherwise, touching any act or acts of bankruptcy committed by such person against whom such commission hath issued, or shall issue forth, in such manner and form as such commissioners are by law authorized to examine, touching or concerning such bankrupt's estate; and if any such person or persons (on payment, or tender of payment, of such reasonable charges, as the said commissioners shall judge sufficient) shall neglect or refuse to come and appear, not having a lawful excuse, to be made known to the said commissioners, and by them allowed, or, being come before them, shall refuse to be sworn, or being of the people called *quakers*, to take the solemn affirmation, by law appointed for such people, or, being sworn or having taken such solemn affirmation, shall refuse to answer all such questions, as by the said commissioners shall be put to him, her, or them, relating to any act or acts of bankruptcy committed by such person or persons, against whom such commission is or shall be awarded, according to the true intent and meaning of this act, and of the other acts now in force concerning bankrupts; that then it shall and may be lawful to and for the said commissioners, or the major part of them, by warrant under their hands and seals, to apprehend any such person or persons so offending as aforesaid; and him, her, or them, to commit to such prison, as to them the said commissioners shall be thought meet, there to remain without bail or mainprize, until such time as such person

Persons neglecting to appear, or refusing to be examined, the commissioners may commit them to gaol till they submit.

None obliged
to travel about
20 miles.

or persons shall submit him, her, or themselves to the said commissioners, and answer upon oath or solemn affirmation to all such questions, as by the said commissioners shall be put to him, her, or them, as aforesaid, according to the true intent and meaning of this act: Provided nevertheless, That no person shall be obliged to travel above twenty miles to be examined as aforesaid. (6)

Gaolers to keep
persons so com-
mitted in close
custody, till
they conform,
or be discharg-
ed by Lord
Chancellor, &c.

7. And it is hereby declared and enacted, That the gaoler and keeper of such prison shall, and he is hereby required to keep such person or persons, who shall be so committed, as aforesaid, and all and every bankrupt or bankrupts, person or persons, who already are, or hereafter shall be committed to their custody by virtue of this or any statute or statutes heretofore made and now in force, concerning bankrupts, by such commissioners, judges or justices of the peace, as aforesaid, in close and strait custody within the walls of the said prison, until such bankrupt or bankrupts, person or persons, shall submit him, her, or themselves to be examined by the said commissioners, as aforesaid, and shall conform him, her, or themselves to this act, and all the other acts already made and now in force concerning bankrupts, or be by the lord chancellor, lord keeper, or commissioners for the custody of the great seal of *Great Britain*, for the time being, or by the said commissioners, or otherwise, by due course of law discharged; and in case such person be removed by *habeas corpus*, the gaoler or keeper of such prison whereto he shall be committed, shall confine such prisoner within the walls of the prison, till discharged as aforesaid; and in case any gaoler or keeper of any prison, to whom any such bankrupt or bankrupts, person or persons, shall be so committed, as aforesaid, shall wilfully

Gaoler suffer-
ing such per-
son to escape,
or to go with-

(6) This is the same as 4 & 5 *Ann. c. 17. sect. 3.* but very materially different from 5 *Geo. 2. c. 30. sect. 16.* which was intended to correspond with it. See observations upon that section.

suffer such bankrupt or bankrupts, person or persons, to escape from such prison, or to go without the walls or doors of the said prison, until he, she, or they shall be duly discharged, as aforesaid, shall, for such his offence, being duly convicted by indictment or information, forfeit five hundred pounds for the use of the creditors of such bankrupt. (7)

8. And be it further enacted, That the gaoler or keeper of such prison, as aforesaid, shall, upon the request of any person or persons, being a creditor or creditors of such bankrupt (and having proved his, her, or their debt under the commission, and producing a certificate thereof under the hands of the said commissioners, which such commissioners are hereby required to give *gratis*) forthwith produce and shew such person or persons so committed, as aforesaid, to any such creditor or creditors requesting the same; and in case such gaoler or keeper of such prison shall refuse to shew, or shall not forthwith produce such person or persons so committed, as aforesaid, and being in his actual custody at the time of such request, to such creditor or creditors of such bankrupt, requesting to see such person or persons, committed, as aforesaid, such gaoler and keeper of such prison shall forfeit, for such his wilful refusal or neglect, the sum of one hundred pounds for the use of the bankrupt's creditors, to be recovered by action of debt in any of his majesty's courts of record at *Westminster*, in the name or names of the creditor or creditors requesting such sight of such prisoner: which forfeiture shall be divided among the bankrupt's creditors; and for every other like offence shall forfeit the sum of two hundred pounds for the use of the bankrupt's creditors, to be recovered and divided as aforesaid. (8)

out the walls, shall forfeit 500*l.* for the use of the creditors.

Gaoler, when requested by a creditor, shall forthwith produce such person so committed;

and in case of refusal shall forfeit 100*l.* to be divided among the bankrupt's creditors;

and for every other like offence 200*l.* to be divided as above.

(7) This is something different in 5 Geo. 2. c. 30. sect. 18.

(8) This is almost *verbatim* the same as 5 Geo. 2. c. 30. sect. 19. except that the last sentence of this section is there omitted.

Person having accepted trust of bankrupt's estate, and not discovering the same, shall forfeit 100*l.* and double the value of the estate, for the use of the creditors.

9. And for the better discovery of a bankrupt's estate, in case he, she, or they shall refuse or neglect to surrender him, her, or themselves, and conform to this and the other acts made concerning bankrupts, as aforesaid: Be it enacted by the authority aforesaid, That all and every person and persons, who shall have accepted of any trust or trusts, and shall conceal or protect any estate, real or personal, of any person or persons becoming bankrupt, as aforesaid, from his, her, or their creditors, and shall not within thirty days next after such commission shall issue forth, and notice thereof shall be given to such person or persons, discover and disclose such trust and estate in writing, to some one or more of the commissioners, and submit him, her, or themselves to be examined by the commissioners, in and by the said commission authorized, and truly discover the same, shall forfeit the sum of one hundred pounds, and double the value of the estate, either real or personal, so concealed, to and for the use and benefit of the said creditors, to be recovered by action of debt in any of his majesty's courts of record at *Westminster*, in the name of the assignee or assignees of the said commissioners; in which case costs shall be allowed to either party, as in other cases. (9)

Discoverers of bankrupts estates to be allowed 3*l.* per cent.

10. And be it further enacted by the authority aforesaid, That all and every person and persons, who shall, within sixty days next after the time allowed to such bankrupt to surrender himself, and to conform, as aforesaid, voluntarily come in and make discovery of any part of such bankrupt's estate before such commissioners, authorized as aforesaid, shall be allowed three pounds *per centum* out of the neat proceed of such bankrupt's estate, which shall be recovered on such discovery; which shall be paid to the person or persons so discovering the

(9) This is adopted by 5 Geo. 2. c. 30. sect. 21.

same by the assignee or assignees of such bankrupt's estate. (10)

11. And be it further enacted by the authority aforesaid, That where it shall appear to the said commissioners, authorized as aforesaid, that there hath been mutual credit given by the bankrupt, and any other person at any time before the person against whom such commission is or shall be awarded became bankrupt, the said commissioners shall state the account between them; and what shall appear to be due on the balance of such account, and no more, shall be claimed or paid on either side respectively. (11)

Commissioners to state the account, where mutual credit has been given by the bankrupt and others.

12. Provided always, and be it enacted by the authority aforesaid, That the said commissioners, authorized as aforesaid, shall appoint within the said thirty days (so appointed, as aforesaid, for the bankrupt to surrender himself, and conform, as aforesaid) not less than three several meetings for the purposes aforesaid, the last of which shall be on the thirtieth day hereby limited for such bankrupt's appearance. (12)

Commissioners to meet three times within the 30 days appointed for the bankrupt's surrender.

13. And whereas commissions of bankrupts have been often executed with great expence, to the great prejudice of the bankrupt and his creditors; be it further enacted by the authority aforesaid, That there shall not be paid or allowed by the creditors, or out of the estate of the bankrupt, any monies whatsoever for expences in eating

No money to be allowed for eating and drinking of the commissioners, &c.

(10) The allowance for the discovery of the bankrupt's estate by 5 Geo. 2. c. 30. sect. 20. is five per cent.

(11) The balance of the account, or the set-off between the bankrupt and his debtor or creditor, was first introduced expressly into the bankrupt statutes by 4 & 5 Ann. c. 17. sect. 11, though agreeable to the former practice of the commissioners, and this is repeated by 5 Geo. 2. c. 30. sect. 28, where see observations, and a reference to decided cases.

(12) See the corresponding section in 5 Geo. 2. c. 30. sect. 2.

Commissioners ordering such expence, or taking above 20s. for each meeting, or executing any deed; or above 10s. for any warrant, disabled to act as commissioners.

or drinking of the commissioners, or of any other persons, at the times of the meetings of the said commissioners, or of any of the creditors, or others, in order to execute or prepare matters for the execution of such commission; and if any person or persons named, or to be made a commissioner or commissioners in any commission, shall order any such expence to be made, or eat or drink at any such meeting, at the charge of the creditors, or out of the estate of such bankrupt, or receive or take above the sum of twenty shillings, each commissioner for each respective meeting, or twenty shillings each commissioner for executing any deed of assignment, dividend, or other deed, or above the sum of ten shillings for each commissioner for executing any warrant of contribution or seizure, every such commissioner, so offending, shall be disabled for ever after to act as a commissioner in such or any other commission founded on the statutes made concerning bankrupts. (13)

Bankrupts conforming to this act, to have 5l. per cent. out of the estate recovered.

14. And be it further enacted by the authority aforesaid, That all and every person and persons so become or to become bankrupts, as aforesaid, who shall, within the time limited by this act, surrender him, her, or themselves to the commissioners named and authorized in or by any commission of bankrupts, awarded or to be awarded against him, her, or them, and in all things conform as in and by this act is directed, shall be allowed the sum of five pounds *per centum* out of the neat produce of all the estate that shall be recovered in and received on such discovery; which shall be paid unto him by the assignee or assignees of the said commissioners, so as the said five

(13) The 4 & 5 Ann. c. 17. sect. 20, first prohibited commissioners of bankrupt from eating and drinking at the expence of the bankrupt's estate.

This section first takes notice of the fees of the bankrupt.—See observations upon the corresponding section in 5 Geo. 2. c. 30. sect. 42.

pounds *per centum* shall not amount in the whole to above the sum of two hundred pounds; and shall be discharged from all debts by him, her, or them due or owing at the time that he, she, or they did become bankrupt; and in case any such bankrupt shall afterwards be arrested, prosecuted, or impleaded for any debt due before such time as he, she, or they became bankrupt, such bankrupt shall be discharged upon common bail, and shall and may plead in general, that the cause of such action or suit did accrue before such time as he, she, or they became bankrupt; and may give this act and the special matter in evidence; and if a verdict pass for the defendant, or the plaintiff shall become nonsuited, or judgment be given against the plaintiff, the defendant shall recover his costs, as in other cases. (14)

But not to amount to above 200%.

And to be discharged from all debts, and if sued, may plead the general issue, &c.

15. Provided always, and it is hereby declared and enacted by the authority aforesaid, That if the neat proceed of such bankrupt's estate, so to be discovered, recovered, and received, together with what shall be otherwise recovered and received, shall not amount to so much as will pay all and every the creditors of such bankrupt the sum of eight shillings in the pound, after all charges first had and deducted, that then and in such case such bankrupt shall not be allowed the said sum of five pounds *per centum* out of such estate as shall be so recovered in, but shall be allowed and paid by the assignees so much money as the said assignees, and the commissioners authorized as aforesaid, shall think fit to allow to such bankrupt, not exceeding three pounds *per centum*. (15)

If the estate amount not to 8s. in the pound, bankrupt to be allowed only what commissioners and assignees shall think fit.

16. Provided also, and be it further enacted by the authority aforesaid, That no discovery upon oath to be made by any bankrupt or bankrupts, of his, her, or their es-

Bankrupt to have no advantage of this act, unless commissioners

(14) This allowance was first introduced by 4 & 5 Ann. c. 17. sect. 7, which is *verbatim* the same as this section.

The allowance is different, by 5 Geo. 2. c. 30. sect. 7.

(15) See this changed by 5 Geo. 2. c. 30. sect. 7.

certify his conformity :

Nor unless four parts in five of the creditors sign the certificate, and testify their consent.

Nor unless the bankrupt make oath that such certificate and consent were

tate and effects, pursuant to this act, shall intitle such bankrupt or bankrupts to the benefits allowed by this act, unless the commissioners authorized by such commission shall, in writing under their hands and seals, certify to the lord chancellor, or lord keeper, or commissioners for the custody of the great seal of *Great Britain*, for the time being, that such bankrupt or bankrupts hath or have made a full discovery of his, her, or their estate and effects, and in all things conformed himself, herself, or themselves, according to the directions of this act ; and that there doth not appear to them any reason to doubt of the truth of such discovery, or that the same is not a full discovery of all such bankrupt's estate and effects ; and unless four parts in five in number and value of such bankrupt's creditors, who shall have duly proved their debts under such commission, or some other person by them respectively duly authorized thereunto, shall sign such certificate, and testify their consent to such allowance and certificate, and to the said bankrupt's discharge, in pursuance of this act, to be also certified by the said commissioners ; but the said commissioners shall not certify the same, till they shall have proof by affidavit or affirmation in writing of such creditors, or of the persons by them respectively authorized for that purpose, signing the said certificate, and of the power and authority by which any person shall be authorized by any creditor to sign such certificate for any creditor ; which affidavit or affirmation, together with such warrant or authority to sign, shall be laid before the lord high chancellor, lord keeper, or commissioners of the great seal, with the said certificate, in order for the allowing and confirming of the same : and unless such bankrupt make oath, that such certificate and consent of the creditors thereunto were obtained fairly, and without fraud, and unless such certificate shall, after such oath of the bankrupt be allowed and confirmed by the lord chancellor, lord keeper, or

the commissioners for the custody of the great seal of *Great Britain*, for the time being, or by such two of the judges of the courts of king's bench, common pleas, or court of exchequer at *Westminster*, to whom the consideration of such certificate shall be referred by the lord chancellor, lord keeper, or commissioners of the great seal, for the time being; and any of the creditors of such bankrupts are to be allowed to be heard, if they shall think fit, before the respective persons aforesaid, against the making such certificate, and against the confirmation thereof.

(16)

obtained without fraud, and the certificate be confirmed by the lord chancellor, &c.

Creditors may be heard against the making and confirmation thereof.

17. And be it enacted by the authority aforesaid, That every bond, bill, note, contract, agreement, or other security whatsoever, to be made or given by any bankrupt, or by any person for him, or on his behalf, unto, or to the use of, or in trust for any creditor or creditors, or for the security of the payment of any debt or sum of money due from such bankrupt, at the time of his becoming bankrupt, or any part thereof, between the time of his becoming bankrupt, and such bankrupt's discharge, as a consideration, or to the intent to persuade him, her, or them, to consent to or sign any such allowance or certificate, shall be wholly void, and of none effect; and the monies thereby secured, or agreed to be paid, shall not be recovered or recoverable; and the party sued on such bond, bill, note, contract, or agreement, shall and may plead the general issue, and give this act, and the special matter in evidence; any thing herein contained, or any law, custom, or usage to the contrary notwithstanding. (17)

Securities given to creditors for their debts, as a consideration to sign such certificate &c. shall be void,

and the money shall not be recovered.

The party sued may plead the general issue, &c.

(16) The certificate of the bankrupt's conformity was first introduced by 4 & 5 *Ann. c. 17. sect. 19*. See observations, and a reference to cases, upon the bankrupt's certificate under 5 *Geo. 2. c. 30. sect. 10*.

(17) This was introduced by 5 *Ann. c. 22. sect. 3*. and is *verbatim* the same as 5 *Geo. 2. c. 30. sect. 17.*, which see.

Bankrupt to at-
tend the as-
signees, in or-
der to settle
accounts, &c.

And to be al-
lowed 2s. 6d. a
day for such
attendance.
Bankrupt re-
fusing to at-
tend, &c. to
be committed
without bail,
&c.

18. Provided always, and be it enacted by the authori-
ty aforesaid, That after such bankrupt or bankrupts shall
have obtained his, her, or their certificate, and the same
shall be so duly confirmed, as herein is mentioned, every
such bankrupt or bankrupts shall, on fourteen days notice
in writing, to be given to him, her, or them, or to be left
at his, her, or their usual place of abode, by the assignee
or assignees, or their order, thereby requiring him, her, or
them, to attend the assignee or assignees of such bankrupt's
estate, in order to make up, adjust, or settle any account
or accounts between such bankrupt or bankrupts, and any
debtor to, or creditor of such bankrupt's estate, or to at-
tend any court or courts of record, in order to be examined
touching the same, or for such other business which such
assignee or assignees shall judge necessary for getting in
the said bankrupt's estate and effects, for the benefit of his,
her, or their creditors; for which said attendance the said
bankrupt shall be allowed and paid the sum of two shil-
lings and six pence *per diem*, by such assignee or as-
signees, out of the bankrupt's effects; and in case such
bankrupt or bankrupts shall neglect or refuse to attend,
or on such attendance shall refuse to assist in such disco-
very (without good and sufficient cause to be shewn, to
the commissioners for such his, her, or their neglect or
refusal, to be by them allowed as sufficient) such assignee
or assignees making due proof thereof upon oath before the
said commissioners, authorized as aforesaid, the said com-
missioners are hereby impowered and required to issue a
warrant or warrants, directed to such person or persons as
they shall think proper, for apprehending such bankrupt
or bankrupts, and him, her, or them, to commit to the
county gaol, there to remain in close custody without bail
or mainprize, until he, she, or they shall submit to be ex-
amined, and duly conform to the satisfaction of the said
commissioners, authorized as aforesaid, and be by the said

commissioners, or by the special order of the lord chancellor, lord keeper, or commissioners for the custody of the great seal of *Great Britain*, for the time being, or otherwise by due course of law, discharged; and such gaoler or keeper of such prison, to which such bankrupt or bankrupts shall be committed, is hereby required to keep such person or persons in close custody within the walls of the said prison, until he, she, or they be duly discharged, as aforesaid, under the pains and penalties before mentioned for such gaoler or keeper suffering such prisoners, committed pursuant to this act, to escape and go at large. (18)

Gaoler to keep such bankrupt within the walls, on the penalty before mentioned, sect. 7.

19. Provided always, and be it enacted by the authority aforesaid, That nothing in this act shall be construed to extend to give or grant any privilege, benefit, or advantage to any bankrupt whatsoever, against whom a commission of bankrupt, under the great seal of *Great Britain*, since the said twenty-fifth day of *May*, which was in the year of our Lord one thousand seven hundred and sixteen, hath issued, or hereafter shall issue forth, who hath or shall, for or upon marriage of any of his or her children, have given, advanced, or paid, above the value of one hundred pounds, unless he or she shall prove, by his or her books fairly kept, or otherwise upon his or her oath, before the major part of the commissioners in such commission named and authorized, that he or she had at the time thereof, over and above the value so given, advanced, or paid, remaining in goods, wares, debts, ready money; or other estate real or personal, sufficient to pay and satisfy unto each and every person, to whom he or she was anywise indebted, their full and entire debts; or who hath, or shall have lost, in one day, the sum or value of five

This act shall not extend to grant any privilege, &c. to any bankrupt, who upon marriage of any child has given above 100*l*.

unless he make it appear, he had at that time sufficient to pay his just debts:

(18) This provision is first introduced here, and is adopted almost *verbatim* by 5 Geo. 2. c. 30. sect. 36.

Or who has lost at play in one day above 5l. or 100l. in 12 months, next before his becoming bankrupt.

After April 25, 1719, no commission shall issue, unless the debt of one creditor petitioning, amount to 100l. or of two creditors to 150l. or of three or more, to 200l.

Creditor petitioning to give bond to the lord chancellor, &c. to prove his debt, and the party a bankrupt.

pounds, or in the whole the sum or value of one hundred pounds within the space of twelve months next preceding his, her, or their becoming bankrupt, in playing at or with cards, dice, tables, tennis, bowls, shovel board, or in or by cock fightings, horse races, dog matches, or foot races, or other pastimes, game or games whatsoever, or in or by bearing a share or part in the stakes, wagers, or adventures, or in or by betting on the sides or hands of such as do or shall play, act, ride, or run, as aforesaid. (19)

20. And for preventing the taking out commissions of bankrupts fraudulently or maliciously, be it enacted by the authority aforesaid, That no commissions of bankrupts under the great seal of *Great Britain*, shall, after the twenty-fifth day of *April*, which shall be in the year of our Lord one thousand seven hundred and nineteen, be awarded and issued out against any person whatsoever, upon the petition of one or more creditors, unless the single debt of the creditor petitioning for the same, do amount to the sum of one hundred pounds or upwards, or unless the debt of two creditors, so petitioning as aforesaid, shall amount unto one hundred and fifty pounds, or upwards, or unless the debt of three or more creditors, so petitioning as aforesaid, shall amount to two hundred pounds, or upwards: And the creditor and creditors petitioning for such commission, shall, before the same be granted, give bond to the lord chancellor, lord keeper, or commissioners of the great seal for the time being, in the penalty of two hundred pounds, to be conditioned for proving his, her, or their debts, as well before the commissioners to be named in such commission, as upon a trial at law, in case the due issuing forth of the same shall

(19) This was first introduced by 4 & 5 Ann. c. 17. sect. 12 and 15. and this section is repeated almost verbatim in 5 Geo. 2. c. 30. sect. 12.

be contested and tried, and also for proving the party a bankrupt at the time of taking out such commission, and further to proceed on such commission, as herein after is mentioned : And if such debt or debts shall not be really due and owing, or if after such commission taken out, it cannot be proved that the party was a bankrupt at the time of the issuing the said commission, but on the contrary it shall appear, that such commission was taken out fraudulently or maliciously, That then the lord chancellor, lord keeper, or commissioners of the great seal for the time being, shall and may upon petition of the party or parties grieved, examine into the same, and order satisfaction to be made to him, her, or them, for the damages by him, her, or them, sustained ; and for the better recovery thereof, may, in case there be occasion, assign such bond to the party or parties so petitioning, who may sue the same in his, her, and their own name and names ; any law, custom or usage, to the contrary notwithstanding. (20)

21. And be it further enacted by the authority aforesaid, That where any commission of bankrupt shall issue out from and after the said twenty-fifth day of *April*, which shall be in the year of our Lord one thousand seven hundred and nineteen, the commissioners therein named, or the major part of them thereby authorized, shall forthwith, after they have declared the person or persons against whom such commission shall issue, a bankrupt or bankrupts, cause notice thereof to be given in the *London Gazette*, and shall appoint a time and place for the creditors to meet ; which meeting, for the city of

Commission fraudulently or maliciously taken out, lord chancellor may order satisfaction, and assign the bond to the party grieved, who may sue the same in his own name.

Commissioners to give notice in the Gazette, and appoint a time for the creditors to meet, to prove their debts, choose assignees, &c.

(20) This was first introduced into the statutes by 5 *Ann. c. 22, sect. 7.*, and is repeated with some additions in 5 *Geo. 2. c. 30. sect. 23.* See there observations upon it, and a reference to decided cases.

Commissioners
to assign the
bankrupt's
estate ;
and the assign-
ees to keep
books of ac-
count, &c. to
which any
creditor may
resort.

London, and all places within the bills of mortality, shall be at the *Guildhall* of the said city, in order to choose an assignee or assignees of the said bankrupt's estate and effects : at which meetings the said commissioners shall admit the proof of any creditor's debt, that shall live remote from the place of such meeting of the commissioners, by affidavit, and also permit any person duly authorized by letter of attorney from such creditor (oath being made of the due execution thereof, either by an affidavit sworn before a master in chancery extraordinary, or before the commissioners, *viva voce*) to vote in the choice of an assignee or assignees of such bankrupt's estate and effects, in the place and stead of such creditor ; and the commissioners, or the major part of them authorized, shall assign every such bankrupt's estate and effects unto such person or persons, as such creditors, or the major part of them, shall so choose, as aforesaid ; and the assignee or assignees, so chosen, shall be obliged to keep one or more distinct book or books of account, wherein he or they shall duly enter all such sum and sums of money, or other effects, which he or they shall have got in, or received out of the said bankrupt's estate ; to which book or books of account every creditor, who shall have proved his, her, or their debt, shall, at all reasonable times, have free resort, and inspect the same, as often as he, she, or they shall think fit. (21)

None to vote
for an assignee
whose debt
amounts not to
10l. &c.

22. Provided always, and be it enacted by the authority aforesaid, That no creditor, or any other person for and on the behalf of any creditor, shall be permitted to vote in such choice of assignee or assignees, whose debt, or the

(21) The choice of assignees by the creditors was first introduced by 5 *Ann. c. 22. sect. 4.*

This section with some trifling additions is repeated in 5 *Geo. 2. c. 30. sect. 16.*

debt of the person so authorizing him to vote, shall not amount to the sum of ten pounds, or upwards, and who shall, either before the commissioners, or by affidavit, as aforesaid, duly prove their whole debt, as far as he, she, or they are able, and pay contribution money for the same. (22)

23. Provided always, That it shall and may be lawful for the said commissioners, authorized as aforesaid, as often as they shall see cause, for the better preserving and securing the bankrupt's estate, immediately to appoint one or more assignee or assignees of the said estate and effects, or any part thereof; which assignee or assignees, or any of them, shall or may be removed or displaced at the meeting of the creditors so to be appointed as aforesaid, for choice of assignees, if they or the major part of them (whose debts respectively amount to ten pounds or upwards as aforesaid) then present, and if such persons duly authorized, as aforesaid, shall think fit; and such assignee or assignees as shall be so removed and displaced, shall deliver up and assign all the effects and estate of such bankrupt, which shall have come to his or their hands or possession, or which shall have been assigned by the said commissioners, as aforesaid, unto such other assignee or assignees who shall be so chosen by the creditors; as aforesaid; and all the estate and effects of the bankrupt, which shall be delivered up or assigned, shall be, to all intents and purposes, as effectually and legally vested in such new assignee or assignees, as if the first assignment had been made to him or them by the said commissioners; and if such first assignee or assignees shall refuse or neglect, by the space of fourteen days next

Commissioners may appoint assignees, who may be displaced at the meeting of the creditors;

and such assignees shall deliver up the estate of the bankrupt, which is come to their hands, to the other assignees, in whom it shall be legally vested.

(22) This is repeated in 5 Geo. 2. c. 30. sect. 27., the payment of contribution being omitted, which by that statute in sect. 25 is abolished.

Assignee neglecting to make such delivery, shall forfeit 200*l.* to be divided among the creditors.

How to be recovered.

Lord chancellor, &c. may vacate such assignment; and make a new one.

after notice given of the said choice of such new assignee or assignees, and of his or their consent to accept such assignment, signified to the first assignee or assignees, by writing under his or their hands, to make such assignment and delivery, as aforesaid, every such first assignee or assignees shall respectively forfeit the sum of two hundred pounds, to be divided and distributed among the creditors, in such manner as the bankrupt's estate is, or ought to be, and to be recovered by action of debt, bill, plaint, or information, in any of his Majesty's courts of record at *Westminster*, by such person or persons, as such major part of the commissioners, authorized as aforesaid, shall appoint to sue for the same, with full costs of suit, wherein no privilege, protection, or wager of law, or more than one imparlance shall be allowed; any law, custom, or usage to the contrary notwithstanding. (23)

24. And whereas after an assignment made pursuant to the choice of the creditors, it has and may be found necessary and expedient, that such assignments should be vacated, and a new assignment or assignments should be made (of the debts or effects unreceived and not disposed of by the first assignees) to other persons to be chosen by the creditors, as aforesaid, and the former assignment to be vacated and made void; be it therefore enacted and declared by the authority aforesaid, That it shall and may be lawful to and for the lord chancellor, lord keeper, or commissioners for the custody of the great seal of *Great Britain*, for the time being, upon petition of any creditors, to make such order therein as he or they shall think just and reasonable; and in case a new assignment shall be ordered to be made to such creditors, as aforesaid, that

(23) The temporary or provisional assignee was first introduced by 5 *Ann. c. 22. sect. 5*. This section is repeated *verbatim* in 5 *Geo. 2. c. 30. sect. 30*. See there observations upon it.

then such debts, effects, and estate of such bankrupt shall be thereby effectually and legally vested in such new assignee or assignees; and it shall and may be lawful for him or them to sue for the same in his or their own name or names, and to discharge any action or suit, and to give any acquittance for such debts, as effectually, to all intents and purposes, as the assignee or assignees in the former assignment might have done, in case no new assignment had been made; any thing herein, or in any former acts, contained or made to the contrary in any wise notwithstanding; and that the said commissioners shall cause public notice to be given in the two *London Gazettes*, that shall immediately follow the removal of such assignee or assignees, and the appointment of such other assignee or assignees, as aforesaid, that such assignee or assignees is or are removed, and such other assignee or assignees appointed in his or their stead, and that such persons as are indebted to the said bankrupt's estate do not pay such debt or debts to such assignee or assignees as shall be removed, as aforesaid. (24)

The estate of the bankrupt shall be vested in such new assignees.

Commissioners to give notice in the gazette, of the removal of the first assignees.

and of the appointing new ones, &c.

25. And be it also further enacted by the authority aforesaid, That any assignee or assignees, made or chosen, as aforesaid, shall be, and are hereby impowered to make composition with any person or persons, debtors or accountants to such bankrupt, where the same shall appear necessary and reasonable; and to take such reasonable part as can upon such composition be gotten, in full discharge of such debts and accompts; any law, custom, or usage, to the contrary notwithstanding. (25)

Assignees may compound with debtors of the bankrupt.

(24) This power of the chancellor to remove the assignees, and vacate the assignment is first introduced here. This section is repeated *verbatim* by 5 Geo. 2. c. 30. sect. 31.

(25) This power of compounding debts by the assignees, is first introduced here. By the 5 Geo. 2. c. 30. sect. 35., they must have the consent of the major part of the creditors in value at a public meeting called for the purpose.

Bankrupt paying or giving to persons who sued out the commission, money or goods, &c. whereby such persons shall have more in the pound than the other creditors, such commission shall be superseded, and the Lord Chancellor, &c. may award a new one to any creditor petitioning. Penalty of taking such goods, &c.

26. And whereas commissions of bankrupts are frequently taken out by persons, who, by means of such commissions (on a composition proposed by the bankrupt) and on promise not to execute the same, prevail with, and extort from the bankrupts their whole debts, or much greater part thereof than such bankrupts pay to their other creditors, or otherwise get from such bankrupt's goods or other satisfaction, which is contrary to the true intent and meaning of these several statutes made concerning bankrupts, which said statutes intend that all such bankrupt's creditors shall be on an equal foot, and not one preferred before, or paid more than another in respect of his or her debt; be it therefore enacted by the authority aforesaid, That if any bankrupt or bankrupts, shall, after the issuing of any commission against him, her, or them, pay to the person or persons who sued out the same, or otherwise give or deliver to such person or persons goods, or any other satisfaction, for his, her, or their said debt, whereby such person or persons, suing out such commission, shall privately have and receive more in the pound in respect of his, her, or their debt, than the other creditors, such payment of money, delivery of goods, or giving greater or other satisfaction, shall be deemed and taken to be such an act of bankruptcy, whereby on good proof thereof, such commission shall and may be superseded; and it shall be lawful for the lord chancellor, lord keeper, or commissioners for the custody of the great seal of *Great Britain*, for the time being, to award to any creditor or creditors petitioning another commission; and such person or persons so taking or receiving such goods, or other satisfaction, as aforesaid, shall forfeit and lose the whole that he, she, or they shall have taken or received, and shall pay back and deliver up the same, or the full value thereof, to such person or persons as the said commissioners, acting under such new commission, shall appoint, in trust for, and to

be divided among the other of the bankrupt's creditors, in proportion to their respective debts. (26)

27. And whereas persons dealing as bankers, brokers, Bankers, &c. and factors, are frequently intrusted with great sums of money, and with goods and effects of very great value belonging to other persons; it is hereby further enacted, that such bankers, brokers, and factors, shall be, and are hereby declared to be subject and liable to this and other the statutes made concerning bankrupts. (27)

28. Provided always, and it is hereby further declared and enacted by the authority aforesaid, That no farmer, grazier, or drover of cattle, or any other person or persons who is or are, or shall be a receiver general of taxes granted by parliament, shall be intitled as such to any of the benefits given by this act, or be deemed a bankrupt within the same, or within any of the statutes now in force concerning bankrupts; any law, custom, or usage, to the contrary notwithstanding. (28)

29. And be it further enacted by the authority aforesaid, That this act shall be deemed and taken as a public act, of which all judges are to take notice: and if any action shall be brought against any person for what he shall do in pursuance of this act, such person shall and may plead the general issue, and give this act, and the special matter in evidence; and this act shall continue and be in force for the space of seven years, and from thence to the end of the next session of parliament, and no longer. (29)

30. And whereas commissions of bankrupts, and the

(26) This important section is new here, and is repeated *verbatim* in 5 Geo. 2. c. 30. sect. 24.

(27) This section is first introduced here, and is repeated *verbatim* in 5 Geo. 2. c. 30. sect. 39.

(28) This first introduced by 5 Ann. c. 22. sect. 8., and is repeated *verbatim* in 5 Geo. 2. c. 30. sect. 40.

(29) I do not find the power of pleading the general issue given by the existing statutes,

depositions taken before the commissioners of bankrupts, and the proceedings upon such commissions, are most commonly kept by such persons, as act as clerks or secretaries to such commissioners, and, by reason of the death of such clerks or secretaries, are many times lost and mislaid, by means whereof such persons as have or may purchase any messuages, lands, tenements, or hereditaments, under any commission grounded upon the statutes made concerning bankrupts, may be disabled to make out their right and title to the same; and there being no certain place where the creditors of any bankrupt, or any person or persons claiming any estate or interest in any messuages, lands, tenements, or hereditaments, by or under any such commission, as aforesaid, can have recourse to such commission, and the proceedings thereupon; and such commissions, depositions, and proceedings, in case they can be produced, are not at present of record, nor can be given in evidence, which may be of very evil consequence to such purchasers, or persons claiming as aforesaid; be it therefore further enacted by the authority aforesaid; That upon the petition of any person or persons to the lord chancellor, lord keeper, or commissioners for the custody of the great seal of *Great Britain*, praying, that such commissions and the depositions taken thereon, or any part of such depositions, and such certificates so to be allowed and confirmed, as aforesaid, or any certificates heretofore allowed and confirmed, or any other matter or things, relating to the said commissions or the proceedings thereupon, may be entered of record, the lord high chancellor, lord keeper, or commissioners of the great seal, shall and may direct and order such commissions, depositions, proceedings, and certificates, or other matters or things, to be entered of record; and in case of the death of the witnesses proving such bankruptcy, or in case the said commissions, depositions, proceedings, or other matters or things, shall be lost or mislaid, a true copy of the re-

On petition to
lord chancellor,
&c. the
commissions,
depositions,
certificates,
&c. may be
entered of re-
cord,

a true copy
whereof may
be given in
evidence;

cord of such commissions, depositions, and proceedings; or other matters or things, signed and attested as herein-after is mentioned, shall and may upon all occasions be given in evidence to prove such commissions, and the bankruptcy of such person against whom such commission hath been or shall be awarded, or other matters or things; any law, usage or custom, to the contrary notwithstanding. And all certificates which have been allowed and confirmed, or to be allowed and confirmed, and entered of record, as aforesaid, or a true copy of every certificate, signed and attested as hereinafter is mentioned, shall and may be given in evidence in any of his majesty's courts of record, and be, without any further proof, deemed, adjudged, and taken, to be a full and effectual bar and discharge of and against any action or suit, which shall be commenced or brought by any creditor or creditors of such bankrupt, for any debt or demand contracted, due, or demandable, before the issuing of such commission, unless any creditor or creditors of the person that hath such certificate shall prove that such certificate was fraudulently obtained; in which case costs shall be allowed to either party; as in other common cases. And to the end any creditor or other person or persons may know where to search, and see whether such commission hath issued, and find what depositions have been taken by virtue thereof, and what proceedings have been thereupon, and whether the said bankrupt hath made such affidavit or affirmation, as aforesaid, and whether such certificates are entered of record, as aforesaid, and all other matters or things which shall be entered of record, in pursuance of this act, the lord high chancellor, lord keeper, or commissioners for the custody of the great seal, shall appoint a certain proper place near the inns of court, where all and every the matters aforesaid shall be entered of record, where all persons shall be at liberty to search and see if the same are duly entered of record; and the lord chancellor, lord keeper,

as may likewise all certificates which have been confirmed, or a copy thereof, and shall be a bar to any action, &c.

unless proof be made that such certificate was fraudulently obtained.

The lord chancellor, &c. to appoint a place where all the said matters shall be entered of record, and a person to enter the same, and his fees, &c.

or commissioners, shall, by a writing under his or their hands, appoint a proper person, who shall, by himself, or his sufficient deputy, to be approved by the lord high chancellor, lord keeper, or commissioners, by a writing under his or their hands, enter of record such commissions, depositions, proceedings, and certificates, and other matters and things, and have the custody of the entries thereof; and also appoint such fee and reward to be paid to such person for his labour and pains therein, as the lord high chancellor, lord keeper, or commissioners, shall think reasonable, not exceeding what is usually paid in the like cases; and that the person so to be appointed, and his deputy, shall continue to enter of record all and every the matters and things aforesaid, and to have the custody of the same, so long as he or they shall respectively behave themselves well in entering the same of record, and keeping such entries, and shall not be removed but by order in writing under the hand of the lord high chancellor, lord keeper, or commissioners, on a good and sufficient cause therein specified; and in case such person shall die, or be as aforesaid removed, the lord high chancellor, lord keeper, or commissioners for the time being, shall and may, in writing under his or their hands, appoint another person to enter the same of record, who shall have the custody of the entries thereof, and shall have and receive the like fee and reward for his labour and pains therein. (30)

Such person not to be removed but by order of the lord chancellor, &c. who in case of death or removal may appoint another.

4 & 5 A. c. 17. 31. And whereas since the expiration of an act made in

(30) This section is quite new, and is *verbatim* the same as 5 Geo. 2. c. 30. sect. 41.

It is matter of great astonishment, that none of the learned and able men, who have held the great seal since this power was given to them, have availed themselves of it by ordering the proceedings, or an abstract of them to be kept in a public office, that all parties interested might instantly see the state of every commission.—See the writer's suggestion of such a plan in the note to 5 Geo. 2. c. 30. sect. 41.

the fourth and fifth years of the reign of her late majesty Queen *Anne*, intituled, *an act to prevent frauds frequently committed by bankrupts*, where commissions of bankrupt have been issued since that time, the assignee or assignees to such commissions have been appointed by the commissioners acting under the said commissions; which trust of assignment is generally reposed in such person or persons who sued out the said commissions; which oftentimes hath proved a very great loss and inconvenience to the major part of the creditors of the said bankrupt: for remedy thereof, be it enacted by the authority aforesaid, That where any commission of bankrupt hath been issued against any bankrupt or bankrupts since the expiration of the said recited act, that from and after the first day of *May*, one thousand seven hundred and nineteen, it shall and may be lawful for the creditors, or the major part of them (of any bankrupts against whom a commission of bankrupt hath issued as aforesaid) to meet together, upon public notice to be given in the *London Gazette* for that purpose for forty days, either to allow of or remove such assignee or assignees, chosen by the commissioners acting under any commission of bankrupt issued as aforesaid, and to elect and appoint such other assignee or assignees in their places or stead, as they the said creditors, or the major part of them, shall judge most fit and convenient; and that upon electing such new assignee or assignees, that then, and in every such case, the said commissioners acting under such commission of bankrupt, or the major part of them, shall and are hereby declared to be reinvested and fully re-intituled to such bankrupt's estate, or any part thereof (as shall be then undisposed of) and the said commissioners are hereby impowered to dispose of the same, in as full and absolute a manner, to all intents and purposes, as if no former assignment had been made; and the said commissioners, or the major part of them, shall be and are hereby obliged to execute a new assignment unto such

After May 1, 1719, the creditors of any bankrupt against whom a commission is issued since the expiration of 4 & 5 A. C. 17. may allow or remove assignees chosen by commissioners acting under any such commission, and appoint others; whereupon the commissioners shall be reinvested in such bankrupt's estate, &c.

And shall execute an assignment to such new assignees, who shall be intituled to the bankrupt's estate not before got in.

The former assignees to join in such new assignment, &c.

new assignee or assignees elected and appointed as aforesaid; and such new assignee or assignees, from and after such assignment, shall effectually and legally be vested in and entitled, to all intents and purposes, in and to all such part or parts of the bankrupt's estate, as shall not have been got in, or that is yet outstanding or undisposed of by such former assignee or assignees, removed as aforesaid; and that such first assignee or assignees, removed as aforesaid, shall and are hereby obliged to join in such new assignment by the commissioners, as aforesaid, if thereunto required; and shall deliver over upon oath, unto such new assignee or assignees, all such goods, wares, and merchandises, or other estate or effects, and all books, papers, writings, and accompts belonging to the said bankrupt or bankrupts, or his or their estates, which shall be in his, their, or any of their hands, custody, power, or possession, and undisposed of; any law, statute, matter, or thing, to the contrary notwithstanding. (31)

After April 25, 1719, commissioners not capable of acting till they have taken an oath.

32. Provided always, and be it further enacted by the authority aforesaid, That the said commissioners, authorized as aforesaid, and every of them, shall not be capable of acting as a commissioner or commissioners in the execution of any of the powers and authorities given and granted by this present act, or any other act or acts of parliament now in force concerning bankrupts, after the five and twentieth day of *April*, one thousand seven hundred and nineteen (unless it be the power hereby given of administering oaths to commissioners) until such time as he and they respectively shall have taken an oath to the effect following; that is to say;

I A. B. do swear, That I will faithfully, impartially, and honestly, according to the best of my skill and knowledge,

(31) This section applied only to commissions which had issued since the 4 & 5 Ann. c. 17. and before the passing of this statute.

execute the several powers and trusts reposed in me as a commissioner of bankrupt, and that without favour or affection, prejudice or malice.

So help me God. (32)

33. Which oath any two or more of the said commissioners are hereby impowered and required to administer to each other in the same commission named and authorized; and they the said commissioners shall and are hereby required to enter and keep a memorial or memorials thereof, signed by them respectively, among the depositions and other proceedings on each respective commission that shall be issued forth by virtue of this act or any other act or acts of parliament now in force concerning bankrupts. (33)

Two commissioners to administer the same, and keep a memorial thereof.

Continued by 11 Georgii, cap. 29. and further continued by 13 Georgii, cap. 27. Exp.

7 Georgii, cap. 31. 1721.

AN ACT FOR EXPLAINING AND MAKING MORE EFFECTUAL THE SEVERAL ACTS CONCERNING BANKRUPTS.

WHEREAS merchants, and other traders in goods, have been often obliged, and more especially of late years, to sell and dispose of their goods and merchandizes to such persons as have occasion for the same upon trust or credit, and to take bills, bonds, promissory notes, or other persons' securities for their monies, payable at the end of three, four or six months, or other future days of payment, and the buyers of such goods becoming bankrupts, and com-

(32) This section first introduced the oath of the commissioners. Before this they must have acted only upon their honour. It is *verbatim* the same as 5 Geo. 2. c. 30. sect. 43.

(33) This is *verbatim* the same as 5 Geo. 2. c. 30. sect. 44.

missions of bankruptcy being taken out against them, before the money upon such bonds, notes, or other securities, became payable, it hath been a question, whether such persons, giving such credit on such securities, should be let in to prove their debts or be admitted to have any dividend or other benefit by the commission, before such time as such securities became payable, which hath been a great discouragement to trade, and great prejudice to credit within this realm: for remedy whereof be it enacted and declared by the king's most excellent majesty, by and with the advice and consent of the lords spiritual and temporal, and commons, in this present parliament assembled, and by authority of the same, That all and every person and persons, who have given credit, or at any time or times hereafter shall give credit, on such securities as aforesaid, to any person or persons, who is, are, or shall become bankrupts, upon a good and valuable consideration *bonâ fide*, for any sum or sums of money, or other matter or thing whatsoever, which is or shall not be due or payable at or before the time of such persons becoming bankrupt, shall be admitted to prove his, her or their several and respective bills, bonds, notes, or other securities, promises or agreements for the same, in like manner as if they were made payable presently, and not at a future day; and shall be entitled unto, and shall have and receive a proportionable part, share, and dividend of such bankrupt's estate, in proportion to the other creditors of such bankrupt, deducting only thereout a rebate of interest, and discounting such securities payable at future times, after the rate of five pounds *per centum per annum*, for what he shall so receive, to be computed from the actual payment thereof to the time such debt, duty, or sum of money should or would have become due and payable in and by such securities, as aforesaid. (1)

Persons taking bills, bonds, &c. payable at a future day for goods delivered to such as after become bankrupt, shall be admitted to prove their bills, &c. and be intitled to a proportionable part of the bankrupt's estate.

Irish stat. s. 31.

Discounting such securities after the rate of 5l. per cent. for what they receive.

(1) The whole debt must be proved, and when a dividend is ordered, then from the day of the order of divi-

2. And be it further enacted by the authority aforesaid, **Bankrupts shall be discharged of such securities.**
That all and every person or persons, who now are or

dend, a deduction must be made from the dividend of five per cent. by the year till the time when the debt is payable.

When the debt is proved, if the day of payment is so distant, as it is probable that a dividend will be made before that time, a memorandum ought to be made by the commissioners in the margin, that it is a debt due at a future day, and that at the time of the order of dividend a proper deduction ought to be made.

But in the choice of assignees and in the signature of the certificate by the creditors, the whole debt must be considered as in all other proofs.

Lord Kenyon had expressed an opinion in two cases at Nisi Prius that this statute extended to all cases of debts payable at a future day, though no written security was given. But the court of King's Bench decided afterwards that this statute was confined to *written securities*, and Lord Ellenborough observed that "it does not appear that the words of the statute were particularly presented to his (Lord Kenyon's) judgment at the time." *Parslow v. Dearlove*, 4 East 438.

But now this is provided for by 49 Geo. 3. c. 121, sect. 9. which enacts that all *bonâ fide* debts for valuable consideration, payable at a future day, shall be *proved*, and a dividend allowed, as upon a written security under this statute.

But that statute does not give a power to such creditors to petition for a commission. By the first and original statute, 13 Eliz. c. 7. sect. 2. the commissioners were to order the bankrupt's property "*for true satisfaction and payment of the said creditors*;" and the creditors mentioned immediately before, are those whom the trader intended to *defraud* by his act of bankruptcy. And the court of King's Bench in 10 Ann, had decided that where a person had given a note dated first of January, payable one month after date, and became a bankrupt on the 10th of January, the creditor could not prove and have a dividend, because the cause of action accrued after the bankruptcy. *Cattowell v. Clutterbuck*, 2 Str. 867.

Such was the law till it was altered by this statute.

In the 3 Geo. 2. the court of King's Bench decided that this statute did not apply to a contingent debt, and the

shall become bankrupts, shall be discharged of and from all and every such bond, note, or other security as afore-

other eight judges upon a writ of error were unanimously of the same opinion. It is the great leading case upon the subject of contingent debts, and upon the subject of marriage settlements by bankrupts.

The obligor gave a bond to the plaintiff Tully, by which he bound himself, his heirs and executors, to pay 800*l.* upon condition that his executors should pay 400*l.* two months after his death, in case he should marry Martha Latimer, and she should survive him, and then the bond to be void. He married her, and she survived him. The plaintiff Tully, as trustee, brought an action against the obligor's executor Sparkes, who pleaded that the obligor after entering into the bond became a bankrupt, and had obtained his certificate. The plaintiff demurred. The question was, whether it could be proved under the commission; and the judges of the King's Bench said, "it being uncertain whether this bond should ever become due or not, it depending upon a contingency which had not happened at the time of the act of bankruptcy committed, it was impossible to make such abatement of five per cent. as the act directs, and therefore the court held this bond was not within that act."

And as it could not be proved under the commission, it was not barred by his certificate, and therefore judgment was given for the plaintiff. *Tully v. Sparkes*, Lord Raym. 1546. 2 *Stra.* 867.

The opinions of the chancellors have much fluctuated upon this subject. Lord Cowper held that a dividend should be ordered upon such a bond, and the interest of it to be paid to the creditors of the husband during their joint lives, and to be paid to the wife if she survived. Lord Macclesfield doubted of the propriety of this. Lord King decided differently from Lord Cowper, but admitted the proof, if the contingency happened between the act of bankruptcy and the dividend. *Ex parte Caswell*, 2 *P. Wms.* 497.

Lord Talbot afterwards doubted of Lord King's opinion, and Lord Hardwicke said, "that in a case before me since, I have differed from him (*viz.* Lord King) entirely, and see no occasion to alter my opinion." *Ex parte Groome*, 1 *Atk.* 119.

But before that, Lord Hardwicke in two cases, had re-

said, and shall have the benefit of the several statutes now in force against bankrupts, in like manner, to all intents

commended a compromise, and at last was obliged to adopt the law of *Tully v. Sparkes*. He observed, "the case of *Groome* may have hardships, and I am sorry for it; but as the law now stands, I cannot determine otherwise. I hope, however, as I said before, some gentleman will think of a clause by way of amendment to this last bankrupt act, which may remedy and settle this for the future." 1 *Atk.* 120.

Lord Eldon has expressed the same wish in *Ex parte Barker*, 9 *Ves.* 110.

That is an important case under this statute. Upon the marriage of the petitioner with Hannah Hornby, Joseph and William Hornby by their joint and several bond became bound to the petitioner in the penal sum of 2000*l.* with condition to be void, if within three calendar months after the decease of the obligors, or the survivor, the executors should pay to the petitioner, his executors, &c. the sum of 1000*l.*

The obligors became bankrupts. In this case the event was certain upon which the bond was to become payable, but the time only uncertain. Lord Eldon held it could not be proved, and that the statute only applied to debts payable at a certain day, till which time the rebate of interest might be precisely calculated.

In this case Lord Eldon seems to disapprove of the case of *Ex parte Mitford*, 1 *Bro.* 398. in which Lord Thurlow decided that, in a marriage settlement where the bankrupt had covenanted to pay 3000*l.* at the end of seven years by three yearly instalments, but in case of his death before that time, then the 3000*l.* was to be paid within one year after his death, the 3000*l.* might be proved. But may not the trustee or the creditor say in such a case that if it had stood alone upon the remote event, I should have had a clear right to prove, and as the bankrupt has added another event contingent in point of time, but more favorable to me, and less favorable to his estate, I am willing to wave all claim and expectation from that event, and consider the settlement depending upon that alone, which is capable of proof in bankruptcy? Thus considered I think it may be reconciled with the case, *Ex parte Barker*, and all other cases under this statute.

Where a settlement is made upon the wife upon the

and purposes, as if such sum of money had been due and payable before the time of his becoming a bankrupt.

event of the failure or bankruptcy of the husband, it cannot be proved under his commission, both because it is not a debt before the bankruptcy, and because it is a fraud upon the creditors; but where the wife's own property is so settled, it may be proved.

Where a trader on his marriage received 600*l.* with his wife, and gave a bond to a trustee in 2000*l.* upon condition to pay 1000*l.* to him for the use of his wife and children in case of his death or failure, Lord Redesdale, upon consideration of all the cases in England, ordered the trustee to prove under the husband's commission the amount of the wife's fortune, 600*l.* and no more. *Matter of Meaghan*, 1 *Sch. and Lefr.* 179. See, to the same effect, *Ex parte Hinton*, 14 *Ves.* 198.

Except these cases of settlements of a wife's fortune, all other cases where there is not a debt due before the bankruptcy or payable upon some fixed certain day afterwards, there can be no proof under the commission.

As where a party had undertaken to guarantee the payment of a debt of another in writing upon two month's notice, and became bankrupt before he received any notice, Lord Eldon held it was not a debt at the time of the bankruptcy, and therefore could not be proved. *Ex parte Minet*, 14 *Ves.* 189.

In that case the chancellor said, "Is it not Mrs. Tyler's case; where upon an undertaking to replace stock upon demand, no demand being made before the bankruptcy, it was held upon my objection, that the debt could not be proved?" *Utterson v. Vernon*, 4 *T. R.* 570.

In the above case, *Ex parte Minet*, Lord Eldon said, With respect to the case of *Wain v. Walters*, 5 *East.* 10, that there is a variety of authorities directly contradicting the case in the court of King's Bench; which is a most important case with reference to the consequences; for, the undertaking of one man for the debt of another does not require a consideration moving between them.

Upon a bond to replace stock at a certain day, and to pay the amount of the dividends accruing due before that day, the obligor became bankrupt before the day and before any dividend was due. Lord Eldon said, if the condition is broken before the bankruptcy you may prove, but there is no instance of admitting the proof where the condition was not previously broken. If the bond had been for-

3. Provided always, and it is hereby declared, That no such creditor shall be deemed or taken to be a sufficient creditor, for or in respect of such debt, to petition or join in any petition for the obtaining or suing forth any commission of bankruptcy, until such time as such debt shall become actually due and payable. (2)

No such creditor shall join in suing forth a commission until such debt become due.

Anno 5 Georgii 2. cap. 30.

AN ACT TO PREVENT THE COMMITTING OF FRAUDS BY BANKRUPTS.

WHEREAS commissions of bankrupt have been issued Preamble.
against several persons, not long before, and since the expiration of the statute made in the fifth year of his late majesty's reign, intituled, *an act for the better preventing frauds committed by bankrupts*, and such persons have been declared bankrupts by the commissioners by such commissions authorized: and yet several of such bankrupts,

feited either as to the capital or the dividend, it would have done; as if, though the bankruptcy was previous to the time at which the stock was to be replaced, a forfeiture had been incurred by not paying the dividend, and the petitioner might in either case have proved. The bond is not within the statute, and therefore you are without remedy. *Ex parte King*, 8 Ves. 334.

If a trader draws a bill of exchange payable on a certain future day which has been accepted, becomes bankrupt, and then the bill is dishonoured, this may be proved under his commission by 7 Geo. 1. c. 31, *Starey v. Barnes*, 7 East 435.

The preamble of this statute mentions only goods and merchandizes which are sold upon personal securities payable at a future day; but the enacting clause extends to every security given for any sum of money, or any other matter or thing whatsoever upon a good and valuable consideration bona fide. And it has been so decided in *Pattison v. Banks*, Cowp. 540, and *Ex parte Cottrell*, Cowp. 742.

(2) This section is repealed by 5 Geo. 2. c. 30. sect. 22. See there observations upon it.

by reason of the expiration of the said statute, have not only refused to surrender themselves to the commissioners, and to discover and deliver up their estate and effects to the said commissioners, for the benefit of their creditors, but have carried away and concealed the same, in such manner that the said commissioners have not been able to seize the same, to the manifest wrong and injury of their creditors, and to the great discouragement of trade : and whereas many evil-minded persons have, since the expiration of the said statute, bought and taken upon trust and credit divers great quantities of goods, wares, and merchandizes, and have thereby, and by their extravagant manner of living, and otherwise, contracted great debts ; and, having gotten such goods and effects into their custody, have sold or pawned the same for less than the value thereof, and thereby raised ready money, and have withdrawn themselves from their usual places of abode with their effects, into secret places, in order to oblige their creditors to accept of such composition for their respective debts, as such evil-minded persons think fit to offer ; or have carried away their effects beyond the seas, whereby their creditors have been totally deprived of their debts : and whereas many persons have and do daily become bankrupts, not so much by reason of losses and unavoidable misfortunes, as to the intent to oblige their creditors to accept such their unjust proffers and compositions, and to defraud and hinder their creditors of their just debts : therefore to remedy the said abuses, and to supply the defects and inconveniencies of former laws relating to bankrupts, be it enacted by the king's most excellent majesty, by and with the advice and consent of the lords spiritual and temporal, and commons, in this present parliament assembled, and by the authority of the same, That if any person or persons, who since the fourteenth day of May, which was in the year of our Lord one thousand seven hundred and twenty-nine, hath or have

become bankrupt, or who shall at any time hereafter, during the continuance of this act, become bankrupt within the intent and meaning of the several statutes made and now in force concerning bankrupts, or any of them, and against whom a commission of bankrupt, under the great seal of *Great Britain*, hath, since the said fourteenth day of May, which was in the year of our Lord one thousand seven hundred and twenty nine, been awarded and issued out, or shall at any time hereafter be awarded and issued out, whereupon the person or persons, against whom such commission hath issued, or shall issue, hath or have been, or shall be declared bankrupt or bankrupts, shall not within forty-two days, after notice thereof in writing to be left at the usual place of abode of such person or persons, or personal notice, in case such person or persons be then in prison, and notice given in the *London Gazette*, that such commission or commissions is, are, or have been issued, and of the time and place of a meeting of the commissioners therein named, or the major part of them, surrender him, her, or themselves to the said commissioners named in the said commission, or the major part of them, and sign or subscribe such surrender, and submit to be examined, from time to time upon oath, or, being of the people called *quakers*, upon the solemn affirmation by law appointed for such people by and before such commissioners, or the major part of them, by such commission authorized, and in all things conform to the several statutes already made and now in force concerning bankrupts; and also upon such his, her, or their examination, fully and truly disclose and discover all his, her, or their effects and estate real and personal, and how, and in what manner, to whom, and upon what consideration, and at what time or times, he, she, or they have or hath disposed of, assigned, or transferred any of his, her, or their goods, wares, merchandizes, monies, or other estate and effects, and all books, papers, and writings relating thereunto, of which he, she,

Bankrupts
since 14 May,
1729.

not surrender-
ing within 42
days notice.

Conforming to
the statutes.

or they was or were possessed, or in or to which he, she, or they was or were any ways interested or entitled, or which any person or persons had or hath, or have had in trust for him, her or them, or for his, her, or their use, at any time before or after the issuing of the said commission, or whereby such person or persons, or his, her, or their family or families, hath, or have, or may have or expect any profit, possibility of profit, benefit, or advantage whatsoever, except only such part of his, her, or their estate and effects, as shall have been really and *bona fide* before sold or disposed of in the way of his, her, or their trade and dealings, and except such sums of money as shall have been laid out in the ordinary expence of his, her, or their family or families; and also, upon such examination, deliver up unto the said commissioners by the said commission authorized, or the major part of them, all such part of his, her, or their the said bankrupt's goods, wares, merchandizes, money, estate and effects, and all books, papers, and writings, relating thereunto, as at the time of such examination shall be in his, her, or their possession, custody, or power (his, her, or their necessary wearing apparel, and the necessary wearing apparel of the wife and children of such bankrupt, only excepted) then he, she, or they; the said bankrupt or bankrupts, in case of any default and wilful omission in not surrendering and submitting to be examined, as aforesaid, or in case he, she, or they, shall remove, conceal, or embezzle any part of such his, her, or their estate, real or personal, to the value of twenty pounds, or any books of account, papers, or writings relating thereto, with an intent to defraud his, her, or their creditors (and being thereof lawfully convicted by indictment or information) shall be deemed and adjudged to be guilty of felony, and shall suffer as felons without benefit of clergy, or the benefit of any statute made in relation to felons; and in such case such felons goods and estate shall go and be divided among the creditors seeking relief under such

or embezzling
goods to the
value of 20l.
guilty of felony.

Goods of bankrupts
condemned to go to the
creditors.

commission; any law, usage, or custom to the contrary thereof in any wise notwithstanding. (1)

(1) We come now to the most important existing statute in the system of the bankrupt law. This statute has incorporated the three preceding expired statutes, viz. the 4 & 5 *Ann*, c. 17, the 5 *Ann*, c. 22, and the 5 *Geo*. c. 24, and has made considerable alterations and additions, though several sections are *verbatim* the same as in the former statutes.

See the author's observations upon the great changes in the bankrupt law, under the 4 & 5 *Ann*, c. 17.

This section enacts, that the bankrupt shall be adjudged to be guilty of felony, "1st. in case of wilful omission in not surrendering and submitting to be examined as aforesaid; 2dly, in case he or she shall remove, conceal or embezzle, any part of his or her real or personal estate to the value of twenty pounds, or any writings relating thereto, with an intent to defraud his or her creditors, being thereof lawfully convicted by indictment or information." Most of the printed copies of the statutes have *judgment* or *information*, but in the prosecution of Bullock the parliament roll was examined, and the word was found to be correctly written indictment. 1 *Taunt*. 71. Information is a strange mode of prosecution for a capital crime. Lord Hale says there cannot be such a prosecution for a capital offence, 2 *H. P. C.* 151.* This word has been inadvertently introduced.

Green, in his *Bankrupt Law*, has filled several pages to prove that those who have been convicted by *indictment* under this statute have been illegally convicted. *Green*, 208. The error of the printer had not then been detected.

Richard Town, a tallow-chandler, was executed for concealing his effects in the year 1712. Alexander Thompson, an embroiderer, was executed for not surrendering in the year 1712. *Ibid*; and John Perrott, a laceman, was executed in Spitalfields in 1761. 2 *Burr*. 1216.

James Bullock, a bankrupt, was tried at the Old Bailey sessions in September, 1807, before Heath, Justice, upon an indictment framed in pursuance of this section, "for removing, concealing and embezzling personal property to the amount of £20, with an intent to defraud his creditors." The prisoner was found guilty and received sentence of death, but execution was respited at the instance of the judge until the opinions of the judges could be had

Number and limitations of sittings.

2. Provided always, and be it enacted by the authority aforesaid, That the said commissioners, authorized as

upon several objections, which were taken on behalf of the prisoner. The case was argued publicly in the Exchequer chamber before the twelve judges in the following term.

Four objections were made to the indictment, viz. that it was averred in every count of the indictment that "a commission of bankrupt under the great seal of Great Britain was in due manner awarded;" that it ought to have been the great seal of the United Kingdom.

Secondly.—That evidence was given of an act of bankruptcy prior to the petitioning creditor's debt, and therefore the commission was void.

Thirdly.—That in two counts it was averred that the prisoner was in due manner found and declared a bankrupt, whereas the commissioners had admitted a creditor of the bankrupt to prove the act of bankruptcy, who afterwards proved his debt under the commission. But at the trial he had released all claim upon the bankrupt's estate.

Fourthly.—That the commission was void, being stamped only with a treble sixpenny stamp, and not with the stamps required for "every process or mandate under the seal of any of the courts at Westminster."

No judgment was publicly given. But the judges during the argument intimated that there was little weight in any of the objections; and if any one of the objections had been such as that the court of King's Bench must have decided in favour of the prisoner upon a special verdict, the judges ought to have recommended the prisoner to a free pardon. But he was pardoned upon condition of being transported for life. Which was a full confirmation of the proceedings at the trial. *The King v. Bullock*, 1 *Taunt.* 71.

The second and third objections are of extensive general importance. The second will be considered under the 46 *Geo. 3. c. 125. sect. 5*, and the third will be considered under the sixteenth section of this statute.

Bullock afterwards presented a petition to the Lord Chancellor, for the purpose of having the commission superseded, upon the same objections as were urged at the trial and before the judges; but that petition was dismissed, upon the ground that a person attainted can be heard only in a court of justice for the direct purpose of re-

aforesaid, shall appoint within the said forty-two days (so appointed, as aforesaid) for the bankrupt to surrender and conform as aforesaid, not less than three several meetings for the purposes aforesaid, the last of which shall be on the forty-second day hereby limited for such bankrupt's appearance, *except on commissions already issued since the said fourteenth day of May, one thousand seven hundred and twenty-nine, where the person or persons against whom such commission issued has or have before surrendered, and submitted to be examined: in which case the said commissioners, authorized as aforesaid, shall appoint only one sitting more for the purposes aforesaid, unless the assignee or assignees of*

versing the attainder. *Exparte Bullock*, 14 Ves. 452. and 1 Taunt. 71.

Lord Hardwicke has said, "though such a prosecution may be carried on by a person who is not a creditor, yet by the words of the act of parliament it looks as if the legislature intended there should be a concurrence of the creditors under the commission." *Exparte Wood*, 1 Atk. 221.

What words Lord Hardwicke alludes to, I am not able to discover.

In that case he refused to comply with the petition to order the clerk of the commission to attend with the proceedings under the commission at the trial at the Old Bailey. The chancellor could have no jurisdiction.

In that case Lord Hardwicke said, "that Lord Macclesfield did in more instances than one supersede a commission of bankruptcy, where the bankrupt had not surrendered himself within the forty-two days, if there did not appear to be any intention in the bankrupt of defrauding his creditors by not appearing within the time appointed, and where his absence proceeded rather from an ignorance of the consequence or accident; and his lordship took this method to prevent a prosecution." *Exparte Wood*, 1 Atk. 222.

A jury under the direction of a judge, one would think, were quite as competent to determine upon the guilt or innocence of the bankrupt as the lord chancellor; and if a bankrupt had committed a capital crime as a bankrupt, it is quite unintelligible and inexplicable how the prosecution could be stopped by any authority less than a pardon from the crown.

the estate of such bankrupt shall think more sittings necessary, and desire the same, and three weeks notice at least shall be given in the London Gazette, of the time and place of such meetings. (2)

(2) The part of this section printed in italics applied only to commissions partly executed at the time of the passing of the act; to prevent confusion I have directed it to be separated from the rest of the section.

The forty-two days so appointed as aforesaid mean the forty-two days after notice left at the usual place of abode of the bankrupt, and notice in the Gazette. Notice ought not to be inserted in the Gazette till the former notice is given, or unless it is given on the same day. The third meeting will be always that day six weeks after it appears in the Gazette, viz. Tuesday or Saturday.

The other two meetings may be fixed at the discretion of the commissioners, from a regard to the convenience of the creditors, and the benefit of the estate from the choice of assignees. In a case where the commissioners, for their own convenience only, had fixed the two first meetings on the fortieth and forty-first days, Lord Eldon, upon a petition, censured them, and ordered them to appoint two other meetings more convenient to the creditors, and that the assignees might have an opportunity of examining the bankrupt's accounts before his last examination. *Ex parte Smith, June 16th, 1805.*

When the bankrupt is abroad and not likely to surrender within the forty-two days, or if the commissioners cannot attend on the forty-second day, the chancellor, upon the petition of the bankrupt or assignees will enlarge the time; for it can do no prejudice to the creditors. The application must be made either by the bankrupt himself or the assignees, *Fuller's Case, 10 Ves. 189.* The time is always enlarged for forty-nine days, for if the last day is a Saturday the forty-ninth day will also be a Saturday.

The time is enlarged upon condition that the bankrupt shall surrender on the last day, between the hours of eleven o'clock and one. If the time is not enlarged, and the bankrupt does not surrender, it is the practice for the commissioners to wait till midnight, and then to make a proclamation for his appearance, that there may be evidence of his omission in not surrendering and submitting to be examined as required by the statute.

The first section makes the wilful omission in not surren-

3. Provided always, and it is hereby declared and enacted by the authority aforesaid, That it shall and may be lawful

Lord chancellor may enlarge the time for surrendering.

dering a capital felony; and when the bankrupt had not wilfully omitted to surrender within the forty-two days, or within the time which the chancellor had allowed according to the statute, it has been decided he cannot be prosecuted for the felony. *Ex parte Rogers, Amb. 307.* And Lord Macclesfield in such a case ordered the commissioners to take the bankrupt's examination. *Ex parte Sherman, 1719, ibid.* That practice has been followed ever since.

Lord Eldon has observed upon the practice "if a bankrupt does not surrender within the time, my order has no other effect than as an authority to take the examination;" and as a sort of record that the lord chancellor does not think it fit that the bankrupt should be capitally prosecuted; "but if he is not coming to surrender according to law, I do not apprehend that he is within the jurisdiction to order his discharge. Even after my order made the commissioners are not bound to let him surrender."

This Lord Eldon said in a case where the chancellor had made an order, that the commissioners should be at liberty to appoint a meeting and to take the surrender, but between the order and the day appointed the bankrupt was taken in execution, and the chancellor held he could not give the bankrupt any protection. *Anon. 15 Ves. 1.*

But if the commissioners had fixed a day, and the bankrupt had been arrested *cum lo, redendo, vel morando*, then it would have fallen under the same principle as *Ex parte Jackson, 15 Ves. 116*, where the Chancellor held that a bankrupt who was arrested upon his return from the court of chancery, after attending a petition to obtain such an order, and having deviated only to consult his attorney upon the subject, should be discharged.

Lord Eldon has observed, as above, "that the commissioners are not bound to let him surrender."

They are bound to proceed in the distribution of his property, and I conceive they are bound to admit or to compel his attendance in order to assist in that distribution or administration, by a full and fair discovery and disclosure of his estate and effects.

If he conceals his effects to the value of twenty pounds at any time after his bankruptcy, I conceive he would be a capital felon, as that seems to be a crime independent of the surrender within the time limited by the act. But it ap-

to and for the lord chancellor, or lord keeper, or commissioners for the custody of the great seal of *Great Britain* for the time being, to enlarge the time for such person or persons surrendering him, her, or themselves, and disclosing and discovering his, her, or their estate and effects as aforesaid, as the said lord chancellor, lord keeper, or commissioners shall think fit, not exceeding fifty days, to be computed from the end of the said forty-two days: so as such order for enlarging the time be made by the said lord chancellor, lord keeper, or such commissioners, six days at least before the time on which such person or persons was or were so to surrender him, her, or themselves, and make such discovery, as aforesaid.

Books of account to be delivered to the assignees on oath.

4. And be it further enacted by the authority aforesaid, That every such bankrupt or bankrupts, as aforesaid, after any assignee or assignees of his, her, or their estate and effects shall be chosen and appointed, as hereinafter mentioned, shall be, and is, and are hereby required forthwith to deliver up upon oath, or (one of the people called *quakers*) upon solemn affirmation before one of the masters of the high court of chancery, or before any justice of the peace within his respective jurisdiction (which oath or affirmation they are hereby impowered to administer) unto such assignee or assignees all his, her, or their books of accounts, papers, and writings not seized by the messenger of the said commission, or not before delivered up to the commissioners, or the major part of them, and then in his, her, or their custody or power, and discover such as are in the custody or power of any other person or persons, that any ways relate to or concern his, her, or their estate or effects ;

pears from the 7th and 10th sections, and from the form of the certificate, that he cannot be entitled to his allowance or certificate unless he has surrendered within the forty-two days, or the time enlarged by the lord chancellor under this section, or in the words of the statutes, *unless he shall within the time limited by this act surrender, and in all things conform.*

and all and every such bankrupt or bankrupts, not in prison or custody, shall at all times after such surrender as aforesaid, be at liberty, and is and are hereby required to attend such assignee or assignees, upon every reasonable notice in writing for that purpose given by such assignee or assignees unto such bankrupt or bankrupts, or left for him, her, or them, at his, her, or their house or place of abode, in order to assist, and shall assist such assignee or assignees, in making out the accounts of the said bankrupt's estate and effects.

5. And be it further enacted by the authority aforesaid, That all and every bankrupt or bankrupts, having surrendered as aforesaid, shall at all seasonable times, before the expiration of the said forty-two days, or such further time as shall be allowed to such bankrupts, to finish his, her, or their examination, be at liberty to inspect his, her, or their books, papers, and writings, in the presence of such assignee or assignees, or some person to be appointed by such assignee or assignees for that purpose, and to take and bring with him, her, or them, for his, her, or their assistance, such persons as he, she, or they shall think fit, not exceeding two persons at any one time, and to make out such extracts and copies from thence, as he, she or they shall think fit, the better to enable him, her, and them to make a full and true discovery and disclosure of his, her, or their estate and effects; and in order thereto, the said bankrupt or bankrupts shall be free from all arrests, restraint, or imprisonment of any of his, her, or their creditors in coming to surrender, and from the actual surrender of such bankrupt to the said commissioners, for and during the said forty-two days, or such further time as shall be allowed to such bankrupt or bankrupts, for finishing his, her, or their examinations as aforesaid, provided such bankrupt was not in custody at the time of such surrender and submission to be examined; and in

Bankrupt to attend assignees.

Inspect accounts.

Irish Stat. sec. 28.

and be free from restraint during examination, if not in custody before.

Penalty on officer detaining bankrupts.

case such bankrupt shall be arrested for debt, or on any escape-warrant, coming to surrender him or herself to the said commissioners, or, after his or her surrender, shall be so arrested within the time before mentioned, that then on producing such summons or notice, under the hands of the said commissioners, assignee or assignees, to the officer who shall arrest him, her, or them, and making it appear to such officer that such notice or summons is signed by the said commissioners, or the major part of them, or such assignee or assignees, and giving such officer a copy thereof, shall be immediately discharged. And in case any officer shall detain such bankrupt or bankrupts (after he, she, or they shall have shewn such notice or summons to him, and made it appear it was signed as aforesaid) in his custody, such officer shall forfeit and pay to such bankrupt, for his own use, the sum of five pounds for every day such officer shall detain such bankrupt; to be recovered by action of debt in any of his Majesty's courts of record at *Westminster*, in the name or names of such bankrupt or bankrupts, with full costs of suit. (3)

(3) A great many important decisions have sprung out of this section.

The bankrupt is privileged from arrest the whole of the 42d day, though the commissioners may have finished his examination at an early hour of that day, *Ex parte Dunlevey*, 7 *Ves.* 317.

The same would be true, I think, of the whole of the last day of the further time allowed either by the chancellor or the commissioners. For the protection of the bankrupt is extended to such further time as is allowed for the examination by the adjournment of the commissioners. *Davis v. Trotter*, 8 *T. R.* 476.

In all cases the bankrupt will be protected whilst he is going to and staying with, and returning from the commissioners, when it is his duty to attend, even after he has finished his examination.

If a bankrupt be abroad and returns with an intent to surrender, and is arrested upon his landing, before he

6. Provided always, and be it further enacted, That in ^{Bankrupts in custody to be brought before} case any bankrupt be in prison, or in custody, at the time

can conveniently surrender, he will be discharged. *Darby v. Baughan*, 5 T. R. 209.

But if he postpones his intention after his landing to surrender till a future day, he is not protected within the intermediate time. *Kenyon v. Solomon*, Cowp. 156. If he has notice by the messenger to attend the meeting at Guildhall, to make a dividend of his estate, he is protected from arrest in going, staying, and returning. This was decided by the court of King's Bench in an action against the sheriff for an escape; the sheriff having arrested him during his attendance, and afterwards discharged him. *Arding v. Flower*, 8 T. R. 534. Notice in the Gazette, I should think, would be quite sufficient to secure this protection; for it is the duty of the bankrupt to attend every public meeting of the commissioners.

The bankrupt is at no time protected from arrest by his bail. *Exparte Gibbons*, 1 Atk. 238. If he escapes from gaol, he is not protected from being retaken by the gaoler, who may take him, like bail, wherever he finds him. *Exparte Johnson*, 14 Ves. 36. But he is protected against an attachment for non-payment of money, which is considered only as process to enforce payment of a debt, and analogous to an execution. *Exparte Parker*, 3 Ves. 554, and in the matter of M'Williams.

The crown not being named in the bankrupt statutes, and therefore not being bound by them, the bankrupt is not protected from an arrest under an extent from the crown. *Exparte Dicke*, 2 Bl. Rep. 1142.

The privilege of a party from arrest, attending his own cause, extends to a bankrupt attending a petition respecting his bankruptcy in the court of chancery. And his going to his solicitor's house to consult with him upon it, is not a deviation by which he loses his privilege, *eundo or redeundo*.^{*} *Exparte Jackson*, 15 Ves. 116. But this case does not depend upon the construction of any statute, but results from the general principles of the common law as applicable to the subject.

The following most important decision was made by Lord Eldon, in *Hilary term* 1811.

Mr. Vesey, the chancery reporter, has favoured me with the following statement. *Exparte Wood*, H. T. 1811. *Canc.* Wood, a bankrupt, applied to the commissioners to meet and take his surrender before he was ad-

commissioners
at the creditors
expence ;

of issuing of the said commission as aforesaid, and is willing to surrender and submit to be examined according

vertized in the Gazette. They met the day after they had declared him a bankrupt, and took his surrender, and gave him a certificate of it in the usual manner. He was arrested on another day before his bankruptcy was gazetted, and he was sent to Lancaster gaol. Upon his petition to the chancellor to be discharged, the plaintiffs were ordered to discharge him, and the officer to pay the costs of the arrest and of the petition.

The chancellor did not go into the construction of the statute, but said he discharged him from analogies to other cases.

All the time I have been a commissioner, I have declined to join in taking the surrender of the bankrupt ; and long ago I drew up the following reasons in support of my conduct.

The question is this, viz. whether the commissioners can receive the bankrupt's surrender, so as to protect him from arrest before the first meeting advertized in the Gazette.

It must be determined by considering whether any existing statute upon the bankrupt law has enabled the commissioners to give the bankrupt such a protection.

By the first statutes of Elizabeth and James the first, the bankrupt had no protection from arrest, nor any discharge from his debts till the whole were paid.

The 4 and 5 Ann, c. 17. an expired act, first directed that the bankrupt should *surrender* within thirty days after notice left at his house, and after notice given in the Gazette, and submit to be examined, &c. or he should be guilty of felony without benefit of clergy. (see p. 60.)

That was the first statute that rewarded him with the benefit of a certificate of his conformity with the bankrupt statutes.

But that statute gave him no protection from arrest after his *surrender*, till he had obtained his certificate.

The 5 Geo. 1. c. 24. another expired statute, first mentions the protection of the bankrupt from arrest. (see ante, p. 85.) But by that statute the bankrupt is protected only in *going to, staying with, or coming from the commissioners*, in obedience to any notice or summons from them.

This species of protection he would have had independently of any legislative enactment.

to the directions of this act, and can be brought before the said commissioners and creditors for that purpose, the ex-

The protection *eundo, redeundo et morando*, is given by the common law to every necessary attendance upon judicial business and duty. *Meckins v. Smith*, 1 Hen. Bl. 636.

Upon the expiration of the 5 Geo. 1, the 5 Geo. 2. c. 30. was passed. It changes thirty days into forty-two days, and the first section requires that notice shall be left at the bankrupt's usual place of abode, and notice shall be given in the London Gazette of the commission, and of a time and place of meeting of the commissioners. The first notice must precede the second, and the messengers are cautious that the first notice should be left at the bankrupt's dwelling house, either before or on the same day it appears in the Gazette; for by the second section the meetings must not be less than three for the bankrupt's surrender, the last of which shall be on the forty-second day, *herchy limited*, that is, the forty-second day after the service of both notices, or of the last notice; and when the last notice is that of the Gazette, then the forty-second day becomes precisely fixed on a Tuesday or a Saturday.

When these conjunctive notices are properly given, the bankrupt is to surrender himself to the major part of the commissioners, and sign or subscribe *such surrender*, and submit to be examined from time to time. The words *such surrender* must refer to the surrender before described, viz. at a time and place advertized in the Gazette.

The submission to be examined must mean at a time and place advertized for the creditors to attend; for the examination of the commissioners, without the assistance of the creditors, is nugatory and absurd.

Such summons or notice, under the hands of the commissioners, must refer to the only summons or notice mentioned in the act, which is the summons or notice left at his house to appear before the commissioners at Guildhall according to the advertisement.

If the bankrupt is apprehended by a warrant under the hand of a judge or justice of the peace, according to the directions of the 14th section, then the 15th section enacts, if he submits within the times allowed by this act to be examined, as if he had *surrendered as the act requires*, he shall have the same benefit as if he had voluntarily come in and surrendered himself.

if in execution,
commissioners
to attend them
in prison.

pence thereof shall be paid out of the said bankrupt's estate and effects: but in case such bankrupt is in execution, or cannot be brought before the commissioners, that then the acting commissioners shall from time to time attend the said bankrupt in prison or custody, and take his or her discovery, as in other cases; and the assignees of the said estate shall have power, and are hereby required to appoint one or more persons to attend such bankrupt, being in prison or in custody, as aforesaid, from time to time, and to

This voluntary surrender must signify the same as is mentioned every where before, viz. as the act *requires, limits, &c.*

Those who think that he may surrender himself to the commissioners, before he has notice in the Gazette, argue that the statute says he shall be free from arrest from the surrender during the forty-two days, or such further time as shall be allowed. But if he can surrender immediately upon his being adjudged a bankrupt, he may be protected for forty-six or forty-seven days, and it seems to be a less violation of consistency, that by the words *during the said forty-two days*, the legislature should have meant the remainder of that time, than that by forty-two days they should mean forty-six or forty-seven days. If the notice was on a Saturday to appear on the Monday he would be protected forty-two days.

The statute directs that the bankrupt shall attend his assignees, *and in order thereto*, he shall be free from all arrest during the said forty-two days; but the assignees are never chosen till the middle of the forty-second day.

For these reasons, till the case *Ex parte Wood*, as a commissioner of bankrupt I never would receive the bankrupt's surrender before the day advertized in the Gazette. But it is now my duty to conform with that decision, and it is now the constant practice with bankrupts to present themselves the moment after the adjudication is signed, which has a strong appearance of collusion, or to surrender to the commissioners, whenever there are three assembled upon any other business, and where none of their creditors are present.

I cannot think that this was the intention of the legislature. It is to be lamented that the bankrupt was not left to sue for five pounds a day under the statute. The question might then have undergone examination in every court of law.

produce to him or her, his or her books, papers, and writings, in order to prepare his or her last discovery and examination, according to the directions before mentioned; a copy whereof the assignees of the said estate shall apply for, and the said bankrupt shall deliver to them or their order, ten days at least before such last examination. (5)

7. And be it further enacted by the authority aforesaid, Allowances to bankrupts. Irish stat. s. 43. That all and every person and persons so become or to become bankrupts, as aforesaid, who shall, within the time limited by this act, surrender him, her or themselves to the acting commissioners, named and authorized in or by any commission of bankrupt awarded or to be awarded against him, her, or them, and in all things conform, as in and by this act is directed, shall be allowed the sum of five pounds *per centum* out of the neat produce of all the estate that shall be recovered in and received; which shall be paid unto him, her, or them, by the assignee or assignees of the said commissioners, in case the neat produce of the said estate, after such allowance made, shall be sufficient to pay the creditors of the said bankrupt, who have proved their debts under the said commission, the sum of ten shillings in the pound, and so as the said five pounds *per centum* shall not amount in the whole to above the sum of two hundred pounds. And in case the neat produce of the said estate shall, over and above the allow-

(5) By the 49 Geo. 3, c. 121, every bankrupt being in custody *at the time of his or her last examination*, although charged in execution, shall be brought before the commissioners as if he had been in custody on mesue process.

It would have been a still greater improvement if he could have been so brought upon every occasion, where his attendance is necessary before the commissioners. At present if the bankrupt is in execution he can only be brought at the time of his last examination, or on the forty-second day, but that, no doubt, will extend to the enlarged or adjourned days.

Bankrupts discharged freed from debts.

ance hereafter mentioned, be sufficient to pay the said creditors the sum of twelve shillings and sixpence in the pound for their respective debts, that then all and every person or persons, so conforming, shall be allowed the sum of seven pounds ten shillings *per centum* out of such neat produce, to be paid by such assignee or assignees, so as such seven pounds ten shillings *per centum* shall not amount in the whole to above the sum of two hundred and fifty pounds. And in case the neat produce of the said estate shall, over and above the allowance hereafter made, be sufficient to pay the said creditors the sum of fifteen shillings in the pound for their respective debts, that then all and every such person and persons, so conforming, shall be allowed the sum of ten pounds *per centum* out of such neat produce, to be paid by the assignee or assignees, so as such ten pounds *per centum* shall not amount in the whole to above the sum of three hundred pounds; and every such bankrupt shall be discharged from all debts, by him, her, or them due or owing at the time that he, she, or they did become bankrupt. And in case any such bankrupt shall afterwards be arrested, prosecuted, or impleaded for any debt due before such time, as he, she, or they became bankrupt, such bankrupt shall be discharged upon common bail, and shall and may plead in general, that the cause of such action or suit did accrue before such time, as he, she, or they became bankrupts, and may give this act and the special matter in evidence; and the certificate of such bankrupt's conforming, and the allowance thereof, according to the directions of this act, shall be, and shall be allowed to be sufficient evidence of the trading, bankruptcy, commission, and other proceedings precedent to the obtaining such certificate, and a verdict shall thereupon pass for the defendant, unless the plaintiff in such action can prove the said certificate was obtained unfairly and by fraud, or unless the plaintiff in such action can make appear any concealment by such

bankrupt to the value of ten pounds; and if a verdict pass for the defendant, or the plaintiff shall become nonsuited, or judgment be given against the plaintiff, the defendant shall recover his full costs. (7)

(7) A bankrupt cannot have his allowance till he obtains his certificate. Lord Hardwicke seems to have given an unnecessary reason for it, viz. that till he obtains his certificate he can possess no property. But the statute is clear that the allowance is given to the bankrupt for his conforming with the statute, and that must be evidenced by his certificate. *Ex parte Grier*, 1 Atk. 207.

But that seems to be a good reason why a bankrupt under a second commission, even if he obtains his certificate shall not have his allowance unless he pays fifteen shillings in the pound, for till then all his property belongs to his creditors. *Ex parte Gregg*, 6 Ves. 238.

If the bankrupt obtains his certificate, and dies before he receives his allowance, it is a vested interest, and the right to it passes to his personal representative. *Ex parte Trapp*, 1 Atk. 208. *Ex parte Calcot*, 1 Atk. 209.

The commissioners ought to order so much to be reserved, when it conveniently can be done, as will pay the bankrupt his allowance in case he obtains his certificate. But when there is a proper time to make a final dividend, the commissioners may divide the whole if the bankrupt has not got his certificate, and if he obtains it afterwards he has no remedy against the assignees. *Groome v. Potts*, 6 T. R. 548.

The statute directs that the bankrupt shall have these respective allowances *in case the neat produce of his estate is sufficient to pay the creditors ten shillings in the pound, &c.* and the next section uses the words *shall not amount to so much as will pay all and every the said creditors*. In a case where the bankrupt had paid ten shillings in the pound, and petitioned the chancellor to be paid his allowance, lord Hardwicke said, *till after a final dividend it cannot be seen whether the bankrupt will be entitled to any allowance at all*. *Ex parte Stiles and Pickart*, 1 Atk. 208.

But Lord Hardwicke did not say that the allowance should not be made unless every creditor actually received ten shillings in the pound.

No clear rule seems yet to be established for the payment of this allowance. If the first dividend were much above ten or fifteen shillings in the pound, and at the se-

Bankrupt's allowance if he effects amount

8. Provided always, and it is hereby declared and enacted, by the authority aforesaid, That if the neat proceed

cond or a subsequent dividend creditors came in, who out of the residue of the estate could not receive ten shillings in the pound, it would be very hard that the bankrupt should lose his reward for his fair conduct by their delay and lachess. I should therefore reserve an allowance for the bankrupt, if the estate then to be divided, and what had been before divided would have been *sufficient to pay* each creditor ten shillings, or twelve and sixpence, &c. in the pound, if they had received a dividend altogether. This seems to satisfy both the words and intent of the statute.

A bankrupt is not bound to refund his allowance, if irregularly ordered by the commissioners. *Russel v. Russel*, 1 Bro. 269.

And his allowance must be preferred to interest, which is paid only upon the event of a surplus. *Ex parte Morris*, 3 Bro. 79.

In the case of joint and separate creditors there does not seem to be any clear established rule, the statute having nowhere taken notice of joint commissions.

If there were two separate commissions against two partners, then each unquestionably would be entitled to his separate allowance.

But in the case of a joint commission, where one partner had paid all his separate debts in full, above £15,000; and with his partner had also paid more than fifteen shillings in the pound of the joint debts, he petitioned the chancellor to have two allowances, the one in respect of the separate, the other of the joint estate; but the Lord Chancellor (Thurlow) *was clearly of opinion this could not be*. *Ex parte Bate*, 1 Bro. 453.

This seems to be correct. For the statute does not intend that a bankrupt by any combination of circumstances should receive from his effects more than £300.

The same case also seems to establish that a number of partners under a joint commission are to be considered only as one bankrupt, and that one allowance only is to be made to the whole, but to be divided amongst them according to their respective interests in the property which contributed to the payment of the joint debts.

This part of the decision I am inclined to think will not in future be disturbed, though Lord Thurlow himself at first doubted upon it, as appears from the following extract.

of such bankrupt's estate, so to be discovered, recovered, ^{not to 10s. per} and received, together with what shall be otherwise reco-_{pound.}

“ Lord Chancellor thought the proper way of considering the question would be taking the debts as well as the effects in moieties. Bate, therefore, having paid in fact above 20s. on the moiety of the debts, although not quite 15s. on the whole, was entitled to the full allowance; but Henckel, who had not paid 10s. upon his moiety, was entitled to nothing. But this opinion his lordship afterwards changed; for a few days after he declared that the bankrupts were entitled, under the act of parliament, to the sum of £300, being an allowance of 10 per cent. in respect of their joint and separate effects, and that the same ought to be divided between them, according to the portions which the surplus of each of their separate estates, after payment of their respective separate debts, and the respective moieties of their joint estate, have contributed to the payment of their joint debts.” *Ex parte Bate*, 1 Bro. 453.

No one has a greater respect for the opinions of Lord Thurlow than the writer of these observations. But it is quite incomprehensible why the separate creditors of each partner should not contribute to the allowance, and why it should be paid out of the joint effects only.

If the original joint estate, with the surplus of each separate estate, should amount only to £300, and should be sufficient to pay the joint creditors 15s. in the pound, then the partners would be entitled to £30 only amongst them, though the separate estate of each might be many thousands, and the creditors paid in full. The principle of the statute is, that the bankrupt should be rewarded for his honesty, and that those who are benefited by his honesty should contribute equally or equitably to the bankrupt's reward.

It seems therefore repugnant to the intention of the statute and to reason and equity, that in the case of a joint commission, the separate estate should be exempt from all contribution to the allowance.

If I might presume to suggest a mode of settling the allowance, it would be this, viz. that both the joint and separate estates should contribute equitably, provided that each bankrupt should not receive more than the respective limits of £300, £250, or £200.

If A. had a right to £300, from his separate estate, and one half of that, or £150, from the joint estate, then £150

vered and received, shall not amount to so much as will pay all and every the creditors of such bankrupt, who shall have

ought to be repaid in the proportion of £300 to £150, or as two to one. So that the separate estate would take back one hundred, and the joint estate fifty; or, what would be the same thing, the separate estate would pay £200 allowance to A, and the joint estate would pay £100.

Every other case that could occur, would admit of as equitable a distribution and as simple a calculation.

The allowance and certificate were first introduced by the 4 and 5 Ann. c. 17. sect. 7, and 19. and were intended to be given as inducements or rewards to those who made an honest discovery of their property.

The arrangement originally was this: he who conformed was to have his allowance, and he who had the allowance was discharged from all his debts at the time of his bankruptcy, sec. 7. and no one was to have these benefits who did not obtain from the commissioners a certificate of his conformity. Sec. 19.

The subsequent statute, 5 Ann. c. 22. sec. 2. p. 73, first introduced the consent of the creditors.

Till this statute, the certificate was not evidence of all the former proceedings, and, in order to make that alteration, the certificate is introduced here rather awkwardly.

In the year 1722, there is a case reported in 2 P. Wms. 70, in which the defendant pleaded his bankruptcy, and had a verdict against him, *he not being able to get the commission, or a copy thereof to produce at the trial.*

The master of the rolls would not relieve, because he said *it was all at law*; but the chancellor, for that and other grounds, granted a perpetual injunction against the plaintiff. *Blackhall v. Combs.*

That case probably suggested the propriety of making the certificate evidence of all the necessary preceding circumstances.

If the bankrupt obtains his certificate, he is discharged *from all debts due or owing at the time he became bankrupt*, that is, according to the 13 Eliz. c. 7. at the time when he committed the act of bankruptcy. See *Bamford v. Burrell*, 2 B. and P. 1. a very elaborate case, in which it was held that that was the true construction of the words in the section, and that a debt contracted between the act of bankruptcy and the date of the commission could not be

proved their debts under the said commission, the sum of Irish stat. s. 44. ten shillings in the pound for their respective debts, after

proved, and consequently was not discharged by the certificate; and till the 46 Geo. 3. c. 135, if such debts were proved, it was the practice of the court of Chancery to order them to be expunged; but by that statute, section 2, all debts *bonâ fide* contracted before the date of the commissions, may be proved, provided that the creditor had no notice of the prior act of bankruptcy; and by sect. 4, of that act, the bankrupt is discharged by his certificate from all debts proveable under the commission by that statute.

Throughout all the bankrupt statutes the word *debts* is frequently used, but without any explanation or qualification; and there is no discrimination whatever between joint and separate debts, yet from this single word has sprung one of the most extensive branches of the bankrupt law. It will be considered upon a future occasion.

Mr. Justice Buller, "upon a full consideration of the subject has said, under these general laws we are of opinion, that debts proveable under the commission, and debts to be discharged by the certificate are convertible terms, and that debts not due at the time of the act of bankruptcy (now at the date of the commission by 46 Geo. 3), except in the cases specially provided for by particular statutes, are not affected by the commission." *Bamford v. Burrell*, 2 B. and P. 11.

Where this plea was pleaded Lord Mansfield observed, that "we are all of opinion, that the plea given by the statute opens the whole merits of the question in evidence on both sides; and on the merits we think that this was not a debt which could have been proved under the commission." *Alsop v. Price*, Doug. 155.

Hence it appears that upon this plea every court of law has the same jurisdiction as the court of chancery to decide what debts are proveable under the commission.

Where the bankrupt was sued for a debt before his bankruptcy, and a *fieri facias* was sued out, but before the execution the bankrupt obtained his certificate, a motion was made to set aside the writ of execution, and to have the goods and money levied under it restored to the defendant, upon the ground that he had obtained his certificate before the day of execution. *Ch. J. Eyre* said it was the modern practice to interpose in a summary way in all cases where the party would be entitled to relief on an *audité querelâ*.

all charges first had and deducted, that then and in such case, such bankrupt shall not be allowed the sum of five pounds *per centum* out of such estate as shall be so re-

But affidavits being produced to prove that the certificate was void, because the defendant had lost more than £5 in one day by horse-racing—an issue was directed to try that fact under the plea of bankruptcy. *Lister v. Mundell*, 1 B. and P. 427.

It is not necessary, as had been determined in *Paris v. Salkeld*, 2 Wils. 139, to add to this plea that the bankrupt had conformed. *Willan v. Giordani*, *Cooke*, 518.

But the plea will be bad if it does not follow the particular form prescribed by the statute. *Charlton v. King*, T. R. 156.

No one but the bankrupt himself can avail himself of this short general plea, introduced by this section.

If an action is brought against the bankrupt's bail, he must plead the trading, act of bankruptcy, petition, commission, and certificate.

“ And Mr. J. Butler added, I am by no means satisfied that the bankruptcy of the principal can be pleaded by the bail.

“ It may afford ground for the court to give relief on motion, but I do not see how it can be made a legal defence.” *Donnelly v. Dunn*, and *Beddome v. Holbrooke*, 1 B. and P. 448 and 450.

In *Evans v. Gill*, 1 B. and P. 52, the court set aside a regular judgment to permit the defendant to plead his bankruptcy, observing, when he has given up all his effects, “ it would be cruel to charge him from a neglect in the attorney; the necessary consequence of which would be, that he must go to gaol. In all cases of fair bankruptcy, we think the party should have an opportunity of taking advantage of it.”

In the common pleas the plea of bankruptcy must be signed by a serjeant. *Pitcher v. Martin*, 3 B. and P. 171, but it need not be signed by counsel in the court of King's Bench. *Leigh v. Monteiro*, 6 T. R. 496.

Where a debt was contracted in England, and the debtor was afterwards made a bankrupt, and obtained his certificate in Ireland, upon an application to be discharged, upon filing a common appearance, the Lord Chief Justice said, the ground ought to be perfectly plain where the court is called upon to interfere in a summary way. If there is the least doubt, the party must

covered in, but shall be allowed and paid, by the assignees, so much money as the said assignees and commissioners,

put the matter upon record by pleading. The defendant afterwards pleaded his bankruptcy generally, and the court held it *was clearly bad*. *Quin v. Keefe*, 2 Hen. Bl. 533.

When the bankrupt, who has obtained his certificate, is arrested for a debt before his bankruptcy, he must move the court for a rule to shew cause why he should not be discharged upon putting in common bail or entering a common appearance; and if upon shewing cause the plaintiff produces affidavits to shew that the certificate was fraudulently obtained, or under circumstances which if proved at the trial, under the general plea of bankruptcy, would render it void, the court will not interfere, but will discharge the rule and sometimes with costs. *Vincent v. Brady*, 2 Hen. Bl. 1. *Martin v. O'Hara*, Cowp. 823. *Sawley v. Jones*, 2 Black. 725.

When a bankrupt has obtained his certificate, and his bail wish to be discharged, the practice is to move for a rule to shew cause why an *exoneretur* should not be entered on the bail piece.

The origin of this practice is thus neatly described by Lord Mansfield.

"This is an application to the equitable jurisdiction of this court. Formerly the method was for the bail to surrender the defendant, and then for him to apply to be discharged, upon an affidavit, stating the fact of his having become bankrupt since the cause of action arose, and obtained a certificate of his conformity to the commission."

"But of late, where a bankrupt is clearly entitled to his discharge, the court to avoid circuity have ordered an *exoneretur* to be entered on the bail-piece, without the form of a regular surrender of the bankrupt by his bail." *Martin v. O'Hara*, Cowp. 823.

Hence the same objections precisely may be made under this motion as under the preceding arising out of this section, and if the bail do not succeed, in order to indemnify themselves they must surrender their principal. If they do not, their plea afterwards that their principal had obtained his certificate, seems to be a nullity and absurdity, for their undertaking and engagement was, that he would surrender himself to prison or they would pay the debt for him. See the preceding page, and see more upon the bankrupt's discharge, sect. 13.

authorized as aforesaid, shall think fit to allow to such bankrupt, not exceeding three pounds *per centum*. (8)

In what cases
future effects of
bankrupts still
liable to credi-
tors.

Irish stat. s. 45.

9. Provided always, and be it further enacted by the authority aforesaid, That from and after the twenty-fourth day of *June*, one thousand seven hundred and thirty-two, in case any commission of bankruptcy shall issue against any person or persons, who, after the said twenty-fourth day of *June*, one thousand seven hundred and thirty-two, shall have been discharged by virtue of this act, or shall have compounded with his, her, or their creditors, or delivered to them his, her, or their estate or effects, and been released by them, or been discharged by any act for the relief of insolvent debtors after the time aforesaid, that then and in either of those cases the body and bodies only of such person and persons conforming as aforesaid, shall be free from arrest and imprisonment by virtue of this act; but the future estate and effects of every such person and persons shall remain liable to his, her, or their creditors, as before the making of this act (the tools of trade, the necessary household goods and furniture, and necessary wearing apparel of such bankrupt, and his wife and children only excepted) unless the estate of such person and persons, against whom such commission shall be awarded, shall produce clear, after all charges, sufficient to pay every creditor under the said commission, fifteen shillings in the pound for their respective debts. (9)

(8) This allowance is to be whatever the *assignees and commissioners* jointly shall think fit. If there are two assignees, then I should think what any three of the five or the majority shall agree upon: but it ought not to be more than £200, the most the bankrupt can receive when the dividend is above 10s. in the pound.

(9) If a second commission is taken out before the bankrupt obtains his certificate under the first, the certificate under the second and all the proceedings are null and void. Mr. J. Buller observed, "the second would be entirely idle and nugatory; because all his effects belong to

10. Provided also, and be it enacted by the authority aforesaid, That no discovery upon oath, or solemn affirma-

his creditors under the first. I take this to have been determined in the case of a lighterman, where the assignees under the first commission recovered a lighter built by the bankrupt (being uncertificated) after a second commission sued out." *Martin v. O'Hara*, Cowp. 823.

Lord Eldon has said, "In law the second commission is good for nothing. The assignee cannot bring an action or protect himself under it; in short, the second commission cannot have any operation, except under direction of arrangement. If a joint commission issues against persons, one of whom has been declared a bankrupt under a separate commission against him, the joint commission is a nullity, one of the parties being already a bankrupt under a prior commission. So, a joint commission subsisting, a subsequent separate commission against one of those bankrupts is a nullity. We are now in the habit of such arrangement, superseding the one or the other as may best answer the ends of justice; but in Lord Hardwicke's time both the joint and separate commissions stood together."

"It has therefore been usual upon an application of this sort, to direct the petition to stand over with notice to the creditors under the prior commission. Whether the property is to belong to one class of creditors or to another, or upon what terms it is to be distributed, is the subject of arrangement." *Ex parte Crew*, 16 Ves. 236.

And in another case he observed, "it is not to be inferred, therefore, that as the commission cannot be maintained at law, therefore it is to be superseded here."

"I could never conceive how Lord Hardwicke could as he did in fact support both a joint and a separate commission, if the mere fact that a second commission is void at law furnished the guide of his practice."

"It is in the discretion of the great seal whether the second commission should be superseded or not; and I dismiss this petition against Lees with costs."

Lees was the father-in-law of the bankrupt, and had been the petitioning creditor under the first commission fifteen years before the second, and had permitted his son-in-law to trade many years in London without interruption; he now joined with the bankrupt in a petition to supersede the second commission. *Ex parte Lees* and *Ex parte Poulden*, 16 Ves. 477.

tion, to be made by any bankrupt or bankrupts, of his, her, or their estate and effects, pursuant to this act, shall

If a bankrupt obtain his certificate, and the commission be superseded, the certificate also is vacated. The master of the rolls in one case, said, "Cooke obtained his certificate under his separate commission; but that commission being superseded, the certificate fell to the ground, just as if it had never existed; and he became liable to all the consequences of the former commissions." *Everett v. Backhouse*, 10 Ves. 94. Lord Hardwicke has said, *superseding the commission will entirely defeat the certificate.* *Ex parte Leaverland*, 1 Atk. 145.

But if under each of two commissions the bankrupt has obtained a certificate, if he has not paid 15s. in the pound under the second, and if the first, upon the petition of the creditors, should be superseded, still the certificate of the second will not have the effect of a certificate of an original commission, for though the bankrupt may not be considered as a person discharged by that act, he still must be one who has *compounded with his creditors.* *Thornton v. Dallas*, Doug. 46.

A creditor, who has signed the certificate, if the bankrupt under the second commission does not pay 15s. in the pound, may still maintain an action against the bankrupt for the remainder. *Philpot v. Corden*, 5 T. R. 287.

It was objected in this case that the property of the bankrupt was the property of the assignees. Lord Kenyon said, *whenever the assignees make their claim, it will be properly attended to.*

One would think that the assignees would have the same remedy in such a case against the sheriff, for taking the property in the hands of the bankrupt, after the commission, as they have when they are entitled to it after the act of the bankruptcy and before the commission.

In a case of a second commission, the defendant pleaded the general plea of bankruptcy, the plaintiff called the assignee, who proved that the bankrupt's estate had not produced a dividend of fifteen shillings in the pound, nor was likely to do it; upon this the plaintiff had a verdict.

The court afterwards held that this was presumptive evidence that the bankrupt will not pay fifteen shillings in the pound; and not having been contradicted by the defendant, it must be held to be conclusive. *Jelfs v. Bulard*, 1 B. and P. 467.

intitle such bankrupt or bankrupts to the benefits allowed by this act, unless the commissioners authorized by such

So where the defendant had given a warrant of attorney to confess a judgment to the plaintiff, and afterwards took the benefit of an insolvent act, he afterwards became a bankrupt and obtained his certificate. The plaintiff entered up a general judgment and sued out a writ of *fieri facias* against the defendant's goods; no dividend had been made. Upon a motion to set aside the judgment, and writ of execution, for irregularity, Lord Alvanley and the court of common pleas said they could not relieve.

But in this case in my opinion the assignees might have brought the usual actions against the sheriff. *Edmondson v. Parker*, 3. B. and P. 185.

If the bankrupt does not pay fifteen shillings in the pound under the second commission, he cannot be entitled to any allowance. *Ex parte Gregg*, 6 Ves. 238.

Where a defendant pleaded his bankruptcy, and produced his certificate in evidence; the defendant, in reply, proved it was a second commission, and that he had not paid fifteen shillings in the pound, and produced the former commission and the proceedings under it. It was objected that he ought to have proved the trading, act of bankruptcy, and petitioning creditor's debt to support the first commission.

But Lord Kenyon observed, "as the bankrupt surrendered under the first commission, and submitted to it throughout, the evidence given at the trial was *sufficient as against him*, though as against other persons proof of all the facts to support the commission must be given. *Haviland v. Cooke*, 5 T. R. 655.

This is the first time that this section is introduced into the bankrupt law: no similar provision is to be found in the three preceding expired statutes from which the sections of this statute in general have been collected.

The object of this section is not to grant again the same indulgencies to a trader, who has been so improvident as to become a second time subject to a commission of bankrupt, unless his estate under the second commission will pay 15s. in the pound.

If he obtains his certificate, before he makes such a dividend, *his body shall be free from imprisonment, but his future estate and effects shall remain liable to his creditors as before the making of this act.*

The statute does not intend to disturb the first commission or certificate, the meaning therefore is, that the

commission, or the major part of them, shall, in writing under their hands and seals, certify to the lord chancellor, or lord keeper, or commissioners for the custody of the great seal of *Great Britain*, for the time being, that such bankrupt or bankrupts hath or have made a full discovery

creditors who can come under this commission have the same remedy against his effects as if this act had not passed. But if this statute had not existed, then the right of these creditors must be referred back to the 10th and 11th sections of the first existing statute upon the subject, viz. the 13 Eliz. c. 7.

By the 10th section, the creditor may sue for the remainder of his debt, but his remedy can only lie against the person of his debtor, which remedy the certificate under this section is a bar to; for by the 11th section all the lands, goods and chattels, &c. which at any time after he shall acquire, by descent, purchase, or by any means, shall be delivered and sold by the commissioners for the payment of the creditors.

This I should conceive, then, would be the condition of the creditors of a bankrupt under a second commission, who has obtained his certificate without paying 15s. in the pound.

If a third commission under such circumstances should issue, then I should consider the third commission subject to the right of the assignees, as to personal property, and the power of the commissioners, as to real, under the second, precisely as a second commission is subject to the right of the assignees, and the power of the commissioners under the first; where the bankrupt has not obtained his certificate under it. With respect to his property, he is an uncertificated bankrupt.

This is the result of the train of my ideas upon the subject, though I cannot but suspect I have fallen into some error, as the court of King's Bench have expressed unanimously a very confident opinion to the contrary.

"The court were all clear upon this point with the plaintiffs, that the future estate of the bankrupt only remained liable to the claims of his individual creditors under the second commission, not having received 15s. in the pound, which they might respectively sue for as in other cases; but that it could not prevent the vesting of the bankrupt's estate in the assignees under a third commission for the benefit of all the creditors." *Hovil v. Browning*, 7 East. 154.

of his, her, or their estate and effects, and in all things conformed himself, herself, or themselves, according to the directions of this act; and that there doth not appear to them any reason to doubt of the truth of such discovery, or that the same is not a full discovery of all such bankrupt's estate and effects; and unless four parts in five in number and value of the creditors of such bankrupt or bankrupts, who shall be creditors for not less than twenty pounds respectively, and who shall have duly proved their debts under such commission, or some other person by them respectively duly authorized thereunto, shall sign such certificate, and testify their consent to such allowance and certificate, and to the said bankrupt's discharge, in pursuance of this act, to be also certified by such commissioners; but the said commissioners shall not certify the same, till they shall have proof by affidavit or affirmation in writing of such creditors, or of the person by them respectively authorized for that purpose, signing the said certificate, and of the power and authority by which any person shall be authorized by any creditor to sign such certificate for any creditor; which affidavit or affirmation, together with such warrant or authority to sign, shall be laid before the lord high chancellor, lord keeper, or commissioners of the great seal, with the said certificate, in order for the allowing and confirming the same; and unless such bankrupt make oath, or, being of the people called *quakers*, solemnly affirm in writing, that such certificate and consent of the creditors thereunto were obtained fairly and without fraud; and unless such certificate shall, after such oath or affirmation of the bankrupt, be allowed and confirmed by the lord chancellor, lord keeper, or commissioners for the custody of the great seal of *Great Britain* for the time being, or by such two of the justices of the courts of King's bench, common pleas, or barons of the court of exchequer at *Westminster*, to whom the consideration of such certificate shall be referred by the lord chancellor, lord keeper, or

commissioners of the great seal, for the time being; and any of the creditors of such bankrupt are to be allowed to be heard if they shall think fit, before the respective persons aforesaid, against the making such certificate, and against the confirmation thereof; nor shall any commissioner sign such certificate till after four parts in five in number and value of the said creditors shall have signed the same, as aforesaid. (10)

(10) The certificate of the bankrupt's conformity was first introduced by 4 and 5 Ann. c. 17. s. 19, and was given at the first under the hands the commissioners only; the consent of the creditors was introduced afterwards by the 5 Ann. c. 22; these two requisites were incorporated in the 5 Geo. 1. c. 24. s. 16, and they have been continued to this time by this section. The 49 Geo. 3. c. 121. s. 18, in order to give greater facility to certificates, has changed four parts in five in number and value of the creditors into three parts in five in number and value.

It has been decided by Lord Hardwicke, and the decision has been acted upon conformably ever since, that a creditor who proves a debt in two or more rights or characters, can only sign the certificate once, as if he proves a debt due to himself, another debt due to him as an executor, a trustee or guardian, &c. still he is but one creditor, and shall sign once only. *Ex parte Saumarez*, 1 Atk. 84.

But if he proves a debt due to him and others as partners, then he may sign also for the partnership, they being in fact conjunctively another creditor.

So it could not be doubted, I apprehend, if after proofs are made by different creditors, one of them becomes the representative of one or more by operation of law, that he may sign in his own right, and also for every creditor he represents. This has always been the practice of my colleagues and myself.

So one creditor might have a power of attorney from several others to sign, then of course he would sign for himself and for each creditor, from whom he had such a special authority.

These two last cases I presume to give upon my own authority only, not finding they have yet been mentioned in any court.

11. And be it enacted by the authority aforesaid, That every bond, bill, note, contract, agreement, or other se-

Contracts to induce creditors to sign certificates void.

But conformably it has been decided that the bankrupt may sign his own certificate, when he becomes the representative of a creditor who has proved. In *Cooper's case*, *Green*, 260. The case is reported only by *Green* in his *Bankrupt Law*; but Lord Hardwicke is represented to have expressed himself with great confidence.

As one executor can give the bankrupt a discharge, so one only is competent to sign the certificate. *Powell v. Evans*, 5 *Ves.* 839. But where he was a trustee for others; Lord Alvanley, master of the rolls, observed, "what right had he, without consulting the cestui que trust, to absolve the bankrupts from any further demand? A more rash thing never was heard of." *Ibid.*

Where a bankrupt and his assignee have proved a debt under another commission, they ought to join in signing the certificate, because they have distinct interests in not discharging the other bankrupt's estate.

The assignee has an interest in the increase of the dividend, the bankrupt in the increase of his allowance and surplus. I have known in practice the assignee alone sign the certificate, but I should think, for the reason suggested, if the chancellor knew it he would not consider it sufficient.

The creditors by their signatures testify only their consent that the bankrupt shall have his allowance and discharge. Their consent at the first was not required. It was first introduced by the 5 *Ann.* c. 22. s. 2. from which it manifestly appears that the words in this section, viz. *their consent to such allowance and certificate*, signifies the allowance from his estate, and not the allowance of the certificate.

Lord Eldon has made an order, 8th of August, 1809, that the day when each creditor signs shall appear with his name upon the certificate, intimating that he would withhold his allowance, if it were signed before the day of the last examination. But the creditors may be influenced by various honourable motives from the first to give their consent to his discharge.

The conformity to the statute or statutes is a question of law, which the commissioners and the chancellor only are competent to decide.

If the creditors were to sign the certificate between the 42d day and the adjourned or enlarged time, and it was allowed by the chancellor, I should think it would not

curity whatsoever, to be made or given by any bankrupt, or by any other person unto, or to the use of, or in trust

affect its validity, so that a court of law could hold it void as *unfairly obtained*.

But if it were proved, that a commissioner had signed the certificate before the examination was finished, on an enlarged or adjourned day, it would be such a violation of propriety, such a certificate of a falsehood, that every judge and court before whom it was produced, might declare it void, both under this section and section 7, as having been *unfairly obtained*.

Such a distinction I conceive may be suggested between the materiality of the signature of a creditor and a commissioner. But it is proper to subjoin here what Lord Eldon has said upon the subject. "The most absolute and entire discretion is intrusted to the creditors by the statute, and there can be no stronger proof of the good nature and humanity of the British character than the readiness with which creditors sign, without any thought, even previously to the third meeting, when a full disclosure is to be made; though at the time of signing there has been no examination; and I mention it with a hope, that commissioners will remember, that it is very doubtful, whether a signature previous to the last examination is such as the act of parliament intended." *Ex parte King*, 41 Ves. 424.

Lord Chancellor Parker said, the form of certificates in his time, was in this manner—1st. the commissioners certified the bankrupt's conformity, afterwards the creditors certified on the same parchment their consent, at the foot of which the commissioners certified that the creditors had consented according to the act. *Burdock's case*. 6 Geo. 17 Vin. 132. The statute then in force, the 5 Geo. 1. was the same as this, the 5 Geo. 2., upon the subject.

Lord Eldon has frequently said, that the commissioners have nothing to do with the bankrupt's conduct before the date of the commission, even if he had been guilty of obtaining money or goods under false pretences or of any other infamous practice; but if he has acted fairly and conformed as a bankrupt, and a sufficient number of his creditors will testify their consent, the commissioners are not justified in withholding the certificate of his conformity.

Lord Mansfield has truly said in *Robson v. Calze*, Doug. 216. *there is no way of compelling the creditors*

for any creditor or creditors, or for the security of the payment of any debt or sum of money due from such bank-

to sign the certificate, so there is no power or authority any where to force the commissioners to sign. Lord Chancellor Erskine has said, *I have no authority to control, advise, or counsel them upon the subject. Ex parte King, 13 Ves. 181. 11 Ves. 417.* Lord Eldon has also said, *that no court of justice has power to compel the commissioners to certify. Ex parte King, 15 Ves. 128.*

The court of King's Bench also declared they could not interfere with the discretion which the legislature had vested in the commissioners, and that a *mandamus* to compel them to sign could not be granted. *Ex parte John King, 7 East, 92.*

When the commissioners have signed one certificate, and it is sent back to admit other creditors, the commissioners' discretion is not restrained with respect to the second commission, but it is uncontrolled to the same extent as if the first had not existed.

Lord Eldon having given a most satisfactory reason, viz. that in taking the proofs of subsequent creditors, it may appear to the commissioners that the bankrupt had made no disclosure of the property which he had obtained from them, and therefore they were deceived when they granted the former certificate.

The commissioners, in the words of the act, may *have reason to doubt of the truth of such discovery, or that the same is not a full discovery of all such bankrupt's estate and effects. Ex parte King, 15 Ves. 126.*

The creditors, who have expressed their consent in the former certificate, need not sign again, but the commissioners must sign again, with a new date of the time when their subsequent signatures and seals are annexed to the certificate.

The creditors must give a special power of attorney to another to sign the certificate for them; a general power to receive debts and to give releases and discharges is not sufficient. But one partner only may bind the rest by signing the letter of attorney, though it is a deed; and Lord Eldon added, *there is a vast number of acts in bankruptcy, upon which, if one partner is not permitted to act for the others, the inconvenience is obvious. Ex parte Mitchell, 14 Ves. 598.*

Such a letter of attorney from a creditor abroad must be attested by a notary public in the usual form. 24 Geo. 2. c. 57. s. 10. See post.

rupt, at the time of his becoming bankrupt, or any part thereof, between the time of his becoming bankrupt, and

There is no meeting prescribed by the statutes between the last examination and the day appointed by the commissioners for the first dividend. If any creditor after the last examination wishes to prove his debt in order to assent to or dissent from the certificate, he may have a meeting at his own expence: it is held at Guildhall; and previous notice must be given in the Gazette, that the rest of the creditors may attend to examine into the fairness of it. This is the general practice.

It has been the practice of my colleagues and myself to permit any other creditor to prove at the same time, provided that he would pay his share of the expence in proportion to their respective debts.

But if creditors come in and prove debts after the commissioners have signed the certificate, and whilst it is waiting for the chancellor's allowance, the chancellor will not send it back to have their debts and signatures taken into the computation, but will allow it, unless they can shew it has been fraudulently obtained. *Ex parte Pydell*, 1 *Atk.* 73.

And if a creditor applies to the chancellor to be permitted to prove a debt, in order to oppose the certificate, the chancellor will not stay the certificate, unless he can give a satisfactory account for not applying sooner. *Ex parte Adams*, 2 *Bro.* 48.

But he may be heard against the allowance of the certificate by shewing fraud, &c. even though his debt is under 20l. *Ex parte Allen*, 17 *Vin.* 134.

And it is not necessary that he should have proved, for though he elects to proceed at law, he may lay a ground for staying the certificate. *Ex parte Parquet*, 15 *Ves.* 4952.

Creditors who have signed the certificate may afterwards oppose the allowance of it; they may have gained knowledge since they signed it, that it was unfairly obtained. *Tudway v. Bourne*, 2 *Burr.* 716.

In calculating the number of creditors who must sign out of the whole number who have proved, whose debts are 20l. or more each, if there is a fraction, one for that fraction must sign, as if seventeen have proved, then three fifths of seventeen are equal to ten and one fifth, and as ten would be less than three fifths, though eleven is something more, yet eleven must sign, and so of every other number not exactly divisible by five.

Where several creditors lived in one case at Guernsey,

such bankrupt's discharge, as a consideration, or to the intent to persuade him, her, or them, to consent to or

and in another case in Ireland, Lord Hardwicke severely censured the commissioners for having signed the certificate soon after the last examination, and stayed the certificate till these creditors could have an opportunity of proving. *Ex parte Saumarez*, 1 Atk. 84. and *Ex parte Williamson*, 1 Atk. 82.

In the latter case, the bankrupt was a trader in Ireland, and he held that signing the certificate in three months was too precipitate.

And in another case, where there did not appear to be any creditors resident abroad, he declared, though the certificate was not signed till near three months after the issuing the commission, "*I disapprove extremely of commissioners being so precipitate in signing certificates.*" *Anon.* 1 Atk. 84.

But if this practice is improper, it would be easy for the chancellor to fix some period within which the commissioners should not sign it, or he himself allow it.

The creditors and the bankrupt are induced to think it correct by the immemorial form of the advertisement in the Gazette, which directs, that at the last meeting on the forty-second day, the creditors are to *assent to or dissent from the allowance of his certificate.*

When the commissioners are not apprized that there are any creditors resident abroad, as soon as a sufficient number of creditors have signed the certificate, after the bankrupt has finished his last examination, they also sign it; for there is no limit fixed by the legislature or by the chancellor, to which they are directed to postpone it. If the learned persons who hold the great seal would lay down to themselves a rule that they would not allow any certificate till the expiration of a certain number of weeks or months after the date of the commission, then the commissioners would observe a corresponding rule, and not annex their seals and signatures till within three weeks of that time.

The three weeks the certificate lies in the bankrupt's office, after it has been signed by the commissioners before it is allowed by the chancellor, is only a reasonable time for the creditors to come in to oppose it after public notice in the Gazette, fixed by the discretion of the chancellor, and does not depend upon any legislative authority.

sign any such allowance or certificate, shall be wholly void, and of no effect; and the monies thereby secured,

In February 1711, Sir Stephen Evance's certificate was signed by the commissioners; in March following, he died, and the 2d of April 1714, the certificate was confirmed by Lord Chancellor Harcourt. *Bromley v. Goodere*, 1 Atk. 75. 1743.

That would give his representatives a right to his allowance and all his property acquired after the date of the certificate, if Lord Hardwicke's decision had been correct.

In that case Lord Hardwicke held, "the operative force of it arises from the consent of the creditors; the reason of allowance by the chancellor is to prevent surprize, and is but a condition subsequent, if you make it a condition; and when the certificate is confirmed, it has its effect from the beginning." It is extraordinary that that great man should have fallen into such an error, as it is contrary to the clear words of the statute.

When a certificate was signed by the creditors and commissioners, and whilst it waited for the allowance of the chancellor, the bankrupt became entitled to a legacy by the death of a testatrix; the commissioners assigned this legacy to the assignees, and then the certificate was allowed.

Lord Mansfield and the court of King's Bench were clearly of opinion that this legacy passed to the assignees. *Tudway v. Bourn*, 2 Burr. 716. A. D. 1759. This case was sent by Lord Northington to the court of King's Bench, no doubt from respect to his predecessor.

Lord Kenyon also has declared, "as to the certificate being signed but not allowed, it operates as nothing. I remember a case where a lottery ticket was given to the bankrupt by a creditor who had signed his certificate, as a mark of his approbation of his conduct; but it having been drawn a considerable prize before the actual allowance of the certificate, it was claimed and shared by the creditors at large." *Webb v. Ward*, 7 T. R. 296. A. D. 1797.

All certificates formerly were referred to the judges; but the great seal finding this rather inconvenient, have of late taken the cognizance of it upon themselves, and they must exercise this power in a discreet and equitable manner. *Lord Hardwicke*, 1 Atk. 57.

Davies in his Bankrupt Law gives the opinions of Lord Cowper and Lord Talbot when they were at the bar that

or agreed to be paid shall not be recovered or recoverable; and the party sued on such bond, bill, note, contract, or

the chancellor after allowance had no jurisdiction to recal a certificate. Yet he gives a case in which Lord Macclesfield ordered a separate certificate to be recalled and disallowed. *Anon. Davies* 437.

But the chancellor could only recal it because it was obtained unfairly and by fraud, which would render it void in every court, and it would afford no protection to the bankrupt's person or property.

The deposition or affirmation of the bankrupt that he has obtained the certificate and consent of the creditors and without fraud, is not produced before the commissioners; but when the certificate is signed by them it is left with it and the proceedings in the bankrupt office.

Where a joint certificate was granted by the commissioners, but one died without having made the usual affidavit that it was obtained fairly and without fraud, it was allowed as the separate certificate of the survivor. *Ex parte Currie*, 10 Ves. 51.

Where there is a joint commission, the bankrupts may either have a joint certificate, or each partner may have a separate certificate.

The certificates must be separate when the joint creditors assent to the certificate of one and dissent from the certificate of another.

Where there is a joint commission, and separate debts are proved, then with respect to the certificate of one partner, as A., the joint creditors and the separate creditors of A. are to be numbered together, and the joint debts with the separate debts of A. must be summed together, and three fifths in number and value must sign A.'s certificate, and so of any other partner.

If any person, even without the knowledge and privity of the bankrupt, gives money to a creditor to sign the certificate, it is void under this section, for it is not obtained fairly and without fraud.

For though this is hard upon an honest bankrupt, yet still it would be a fraud upon the creditors who had signed under the influence of so corrupt an example, and it would still be a greater fraud upon those creditors who did not intend to consent to the bankrupt's discharge. *Holland v. Palmer*, 1 B. and P. 95. *Robson v. Catze*, Doug. 216.

Lord Eldon has said, that it has been determined at law,

agreement, shall and may plead the general issue, and give this act, and the special matter in evidence; any thing therein contained, or any law, custom, or usage to the contrary notwithstanding. (11)

that the certificate is good for nothing, if money has been given to obtain it, though without the privity of the bankrupt. *Ex parte Butt*, 10 Ves. 359.

So where it could be proved that any creditor had been induced to sign the certificate by any promise or engagement to pay money from any person whatever, the certificate would no doubt be void, though there have yet been no case to that effect.

And if a creditor is induced by money or any promise to withdraw a petition to stay the certificate, the certificate will be void. Petitions against a certificate cannot now be withdrawn as of course. *Ex parte Gibson*, Cooke 465.

Where the bankrupt discovers that his certificate is void from the improvident officious interference of a friend, or the malice of an enemy, the chancellor upon his application will order the certificate to be cancelled, that he may have an opportunity of obtaining another, free from objection. *Ex parte Harrison*, 22d Feb. 1806.

It should seem that the creditor, who had received the money or promise, might sign, if he repays the money, and releases the promise.

(11) Nothing can be clearer than the words in general of this section. Yet Lord Chancellor Parker held a bond given by a bankrupt to a creditor, to pay him the whole of his debt if he would withdraw a petition to the chancellor against the allowance of the certificate, was not rendered void by this statute, but was legal. *Lewis v. Chase*, 1 P. Wms. 620.

One could hardly suppose that Lord Parker had read this section with due attention; for every security given to the intent to persuade him (a creditor) to consent to any such certificate shall be void; but to withdraw opposition from a certificate, is the same as to consent to a certificate; and where such a bond was given, and all the circumstances were pleaded, the plea was held to be good by the court of Common Pleas. *Sumner v. Brady*, 1 Hen. Bl. 647.

As such a bond or security seems to be within the express words of the statute, it could not be doubted but the defendant might have had the advantage of this defence under the plea of the general issue.

The statute avoids such security, by any other person besides the bankrupt.

12. Provided always, and be it enacted by the authority aforesaid, That nothing in this act shall be construed to Persons excepted from the benefits of this act.

Money paid by any one to a creditor to induce him to sign the certificate, may be recovered back in an action for money had and received, as all money may be recovered which is extorted by oppression. A sister had paid money to a creditor to sign her brother's certificate; she was allowed to recover it back.

Lord Mansfield observed, "if any near relation is induced to pay the money for the bankrupt, it is taking an unfair advantage, and torturing the compassion of his family; if it is the money of the bankrupt himself, it is giving one creditor his debt to the exclusion of the others, and a fraud upon them." *Smith v. Bromley*, Doug. 696.

An agreement with the assignees, or a promise to them, to pay them a sum of money for the benefit of all the creditors when the bankrupt obtained his certificate, though it was not to the prejudice of any particular individual who had proved under the commission, yet was held clearly void under this section. *Jones v. Barkley*, Doug. 684.

But where a promise was made by a bankrupt to give evidence for the assignees, and to give them a release, if they would procure his certificate, the court of exchequer said, it is a *common and by no means an improper transaction*. *Selby v. Crew*, 2 Anst. 504.

If a petition is presented to stay a certificate on or before the last of the twenty-one days it lies in the office for the chancellor's allowance, the certificate is stayed, and the petition is set down to come on in the usual course.

The petition must be served on the bankrupt, that he may have an opportunity of answering the allegations in the petition. *Cooke*, 463.

See general orders upon this subject, 22d March, 1796, 12th April, 1796; and 16th November, 1805.

The statute does not take notice of bonds, bills, &c. given to a creditor, in order to induce him to refuse to sign the bankrupt's certificate. The consideration of these must be referred to the general principles of the common law, as bonds, bills, and securities given for an illegal and immoral purpose. Such an engagement would be void, as a *turpis contractus*. And if the money were paid, it could not be recovered back. The plaintiff would be a *particeps criminis*, who would have no countenance or aid in a court of law or equity. The parties engaged in such a malicious and iniquitous transaction might unquestionably be prosecuted for a conspiracy.

extend, or give or grant any privilege, benefit, or advantage to any bankrupt whatsoever, against whom a commission of bankrupt, under the great seal of *Great Britain*, since the said fourteenth day of *May*, which was in the year of our Lord one thousand seven hundred and twenty-nine, hath issued, or hereafter shall issue, who hath or shall, for or upon marriage of any of his or her children, have given, advanced, or paid above the value of one hundred pounds, unless he or she shall prove, or by his or her books fairly kept, or otherwise upon his or her oath, or being of the people called *quakers*, upon solemn affirmation, before the major part of the commissioners in such commission named and authorized, that he or she had at the time thereof, over and above the value so given, advanced or paid, remaining in goods, wares, debts, ready money, or other estate real or personal, sufficient to pay and satisfy unto each and every person, to whom he or she was any wise indebted, their full and entire debts; or who hath or shall have lost in any one day the sum or value of five pounds, or in the whole the sum or value of one hundred pounds, within the space of twelve months next preceding his, her, or their becoming bankrupt, in playing at or with cards, dice, tables, tennis, bowls, billiards, shovel-board, or in or by cockfighting, horse races, dog matches, or foot races, or other pastimes, game or games whatsoever, or in or by bearing a share or party in the stakes, wagers, or adventures, or in or by betting on the sides or hands of such as do or shall play, act, ride, or run, as aforesaid; or that within one year before he or she became bankrupt, shall have lost the sum of one hundred pounds, by one or more contracts for the purchase, sale, refusal, or delivery of any stock of any company or corporation whatsoever, or any parts or shares of any government or public funds or securities, where every such contract was not to be performed within one week from the time of the making such contract, or where the stock or other things so bought

or sold was not actually transferred or delivered in pursuance of such contract. (12)

13. And be it further enacted by the authority aforesaid, that if any bankrupt, who shall have obtained his or her certificate from the acting commissioners, and such certificate shall have been allowed and confirmed, as by this act is directed, shall be taken in execution, or detained in prison, on account of any debts due or owing before he or she became bankrupt, by reason that judgment was obtained before such certificate was allowed and confirmed, it shall and may be lawful for any one or more of

Bankrupt imprisoned after certificate allowed, now to be discharged.

Irish Stat. s. 49.

(12) A trader when he was insolvent gave his niece one thousand pounds upon her marriage, and it was contended that in consequence his certificate was void; but Lord Hardwicke justly said, *this was a penal clause, and it ought to be construed strictly, and be confined to the children of a bankrupt, and not to extend any further. Ex parte Saumarez, 1 Atk. 84.*

This clause seems to be too severe at present, for every respectable trader must be expected to give his son or daughter in marriage more than one hundred pounds. But if he should be insolvent at the time an advantageous offer is made to his family, he is driven to the painful necessity of prohibiting the connection, confessing his insolvency, or of being incapable of having a certificate if bankruptcy ensues.

The court of Common Pleas held that insuring in the lottery was not a *pastime* or *game* within the meaning of the statute. *Lewis v. Piercy, 1 Hen. Bl. 29.*

Nor is a loss by keeping a lottery office within the meaning of it. *Ex parte Richardson, 21st Dec. 1791, Cooke 463*

After a certificate was allowed a creditor who had not proved, petitioned the chancellor for an inspection of the bankrupt's books to discover gaming transactions in order to vacate his certificate; Lord Eldon said, "I doubt very much, when the certificate has been allowed and has its legal effect, whether a person, no creditor under the commission, can come in this way for a discovery; to obtain which *he may file a bill*. I do not think you can get rid of a certificate that has been obtained in every case in which you can stay a certificate." *Ex parte Mawson, 6 Ves. 614.*

the judges of the court wherein judgment has been so obtained against such bankrupt, on such bankrupt's producing his or her certificate allowed and confirmed, to order any sheriff or sheriffs, bailiff or officer, gaoler, or keeper of any prison, who hath or shall have any such bankrupt in his custody by virtue of any such execution, to discharge such bankrupt out of custody on such execution, without payment of any fee or reward; and such sheriff or sheriffs, bailiff or officer, gaoler, or keeper, is and are hereby required to discharge such bankrupt out of custody accordingly, and is and are hereby indemnified from any action for an escape for his or their so doing. (13)

(13) This section is introduced here for the first time. It did not exist in the expired acts. The 7th section has declared that if the bankrupt surrenders, and in all things conforms, he shall have his allowance and a discharge from all his debts due and owing at the time that he did become bankrupt. And in case any such bankrupt shall *afterwards* be arrested or impleaded for any such debt, he shall plead as the statute directs, and his certificate shall be evidence of the trading, &c.

That section provides a remedy only in the case of mesne process.

The word *afterwards* might have a reference either to *conform*, or to *the time that he did become bankrupt*.

But the court of King's Bench have put the latter construction upon it, which is the most favourable to the bankrupt, viz. that if at any time after the act of bankruptcy, he shall be sued, and if a commission issues and he obtains his certificate in time, then he may plead the general plea of bankruptcy prescribed by the statute. *Harris v. James*, 9 East, 82. *Tower v. Cameron*, 6 East, 413.

Under these circumstances the bankruptcy may be pleaded in bar to the action, and the certificate produced in evidence to support the plea.

Lord Kenyon held, at the sittings 1792, that a certificate granted after plea pleaded, but before the trial, would not avail at law. *Langmead v. Beard*, cited 9 East, 85.

But if he shall be taken in execution upon a judgment

14. And be it further enacted by the authority afore-
 said, That upon certificate made under the hands and seals Judge or jus-
 tices may grant
 warrants to ad-
 prehend bank-

obtained previous to his certificate, which he could not avail himself of under sect. 7. then he must be discharged under this section.

This discharges such bankrupt out of custody on such execution, and therefore it discharges him both from the debt and costs.

Lord Ellenborough has said, "we think the intention of the legislature, as collected from the act, must be taken to be, that the bankrupt should be discharged wholly from debt and costs, if he obtained his certificate in time to plead it in bar of the action: and that as nothing is provided to the contrary, that such bar should have the usual effect of entitling the defendant, upon its being found for him, to his costs. And that if he obtained his certificate after judgment, and too late to plead it, that it should still be available for his discharge out of execution for the debt and costs: so that in neither case the defendant should be subject to costs; but that if he obtained his certificate in time to support his plea, his plea should have the common effect of all other pleas in bar which are found for a defendant." *Harris v. James*, 9 East, 82.

I have cited what Mr. J. Buller has said, that what may be proved under the commission, and what the bankrupt is discharged from by his certificate are convertible. see p. 141, and p. 170. This proposition, which is generally, but not universally true, has led some to think that costs incurred after bankruptcy might be proved with the debt which previously existed. Lord Eldon is certainly the first chancellor or judge, who has corrected that very erroneous opinion.

When a commission is sued out, if a creditor will proceed at law, it can only be done with the object of inducing the bankrupt to defraud other creditors, or by working upon the feelings of his friends to prevail upon some of them to ransom his person, if he is thrown into a gaol before he obtains his certificate.

All his property taken in execution may and ought to be recovered by the assignees. It has been well said in the time of Charles the second when no certificate existed, "when once a commission is granted it is folly for the other creditors to sue for their debts at common law or chancery; for if they should recover yet it will not avail them, but they must be liable to the commission, so

rupts not con-
fering.

of the commissioners, by such commission authorized, or to be authorized, or the major part of them, that such

if they had judgment not executed it were vain to sue execution." *Alderman Backwell's case*, 2 Ch. Ca. 191. 1687.

It is doubtful whether these are the words of the chancellor or of the reporter; but it is immaterial, as it must always have been true.

And it is still greater folly now, since the bankrupt can be discharged both from the debt and costs by the certificate. When the bankrupt can plead his certificate the plaintiff must pay costs. Under this section the bankrupt is discharged from the costs, and there seems to be no reason that a plaintiff should afterwards resort to the commission to endeavour to indemnify himself for his own folly and cruelty.

It seems to be fully settled that the bankrupt who has obtained his certificate is not only discharged from the original debt but from all the subsequent costs in every shape.

Lord Kenyon has said, in a case when a *scire facias* was brought after a bankruptcy to revive a judgment obtained before, that "in the present case the *scire facias* was sued out by the plaintiff to enable him to reap the fruits of his judgment; it was a step to lead to execution for his original demand, and the defendant being discharged as to the original judgment we think that all the means that conduce to that end must be considered as consequential upon, and included in the original demand." *Phillips v. Brown*, 6 T. R. 282.

But Lord Kenyon has not said what the reporter has done in the marginal abstract, that these costs could have been proved under the commission.

That becomes quite another question.

That the bankrupt is discharged from the costs when he is discharged from the debt, has also been decided in the Common Pleas. *Willet v. Pringle*, 2 N. R. 190.

The debt and costs are included in the word *execution*, from which this section discharges the bankrupt who obtains his certificate.

But Lord Eldon has fully shewn in *Ex parte Hill*, 11 Ves. 646. where there is a debt proveable before the commission, but an action was brought, and verdict obtained after the bankruptcy, the costs cannot be proved under the commission.

commission is issued, and such person or persons proved before them to become bankrupt or bankrupts, it shall Irish stat. s. 14.

And in that case Lord Eldon expresses the strongest opinion that in no case whatever costs ought to be proved unless they are taxed and judgment is signed before the bankruptcy.

Where there was a nonsuit before bankruptcy, and the costs were taxed, and judgment entered up subsequent to the bankruptcy, lord Kenyon held, "the taxation of costs was merely the ascertaining of the amount of the debt, but the debt existed previous to the bankruptcy. *Hurst v. Mead*, 5 T. R. 365.

The same was decided in *Watts v. Hart*, 1 B. & P. 136.

But C. J. Eyre decided so in that case with much reluctance and much reprobation of the principle.

Lord Eldon thinks there never would have been such a decision, if the case of *Exparte Todd*, before lord Henley had not been overlooked.

In ejectment there was a verdict for the plaintiff and nominal damages; afterwards in the vacation, the defendant became bankrupt, and in the term following the plaintiff signed a final judgment, and had costs *de incremento* then taxed and allowed him; Lord Henley held, these costs did not become a debt till the judgment, and were connected therewith, and that the plaintiff could not be permitted to prove the same as a debt under the commission. *Exparte Todd*, 3 Wils. 270.

The contrary was held by the Common Pleas in *Aylet v. Harford*, Bl. Rep. 1317, but without any reference to the former case.

Where there was an order for costs in Chancery, before the bankruptcy, but the taxation was subsequent, Lord Thurlow held, there was no debt till the taxation, and that they could not be proved under the commission. *Exparte Sneaps*, Cooke, 193.

This has lately been confirmed in the court of King's Bench. *King v. Davis*, 9 East. 318.

Lord Hardwicke and Lord Thurlow have both decided that costs and expences incurred by protesting bills of exchange, before the bankruptcy, may be proved under the commission, but not those which arise afterwards. *Anon.* 1 Atk. 140. *Exparte Moore*, 2 Bro. 597.

Where an action was brought against a trader for a

and may be lawful to and for all or any of the justices of his Majesty's courts of King's Bench, or Common Pleas,

slander, and a verdict was obtained before his bankruptcy, but judgment was signed afterwards, Mr. Justice Willes held that the amount of the damages and costs, for which the judgment was entered, might be proved under the commission; and he said, "*there is no distinction between a tort and a contract, where a judgment follows the verdict.* Longford v. Ellis, E. 25 Geo. 3. cited 1 Hen. Bl. 29.

Lord Eldon in *Exparte Hill*, expresses a strong disapprobation of this decision. It was the decision of the court of King's Bench, though Mr. J. Willes is only mentioned.

But it rests only upon his assertion, unsupported by any reference to authority or to any reason or principle of law.

No action can be maintained upon a verdict, it may be set aside by a new trial, or by arrest of judgment.

There was therefore no proveable debt at the time of the bankruptcy.

When the verdict is for a previous debt, as for goods sold and delivered upon a *quantum valebant*, or for work and labour upon a *quantum meruit*, the verdict may be admitted as the measure of the previous debt, and in those instances it may be adopted, and save the commissioners the trouble of exercising the functions of a jury.

But if there was a verdict upon a promissory note, in which it is the practice to take a verdict for interest till the fourth day of the ensuing term, if the commission were sued out before that time, I should think the commissioners ought not to adopt the verdict, but ought to calculate the interest only to the date of the commission, according to the case of *Lowndes v. Collins*, cited p. 14 ante.

Where a judgment is entered up after the date of the commission, upon a verdict obtained in an action of trover or for a tort, it is not probable that it ever will be held again, that the judgment can be proved under the commission, or that the bankrupt is discharged by his certificate.

These observations were printed before the writer was apprized that Lord Eldon had superseded a commission, where the petitioning creditor's debt was a verdict for damages in an action for a breach of promise of marriage, but the judgment was signed after the date of the commission. He offered a case. *Exparte Charles*, 16 Ves. 256.

or Barons of the courts of Exchequer, and to and for all and every the justices of the peace within that part of the

I have gone thus fully into this important subject, in order to prove that the commissioners in no instance ought to admit the proof of costs, of which there has not been a taxation before the bankruptcy; for, though there are contradictory cases, yet Lord Eldon has shewn that they have been decided with an ignorance of or inattention to, the original case by Lord Henley, and have been founded upon the very fallacious opinion, that because the statute has discharged the bankrupt from the payment of costs to a cruel creditor, he must necessarily have been permitted to prove them under his estate.

To this it may still be farther added, that it would be contrary to all equity that that man who has been endeavouring to get an unfair advantage over the other creditors, should be permitted to call upon them to contribute to his failure by admitting the proof of his costs under the commission.

Where a writ of *feri facias* was executed against the goods of the bankrupt, after it was signed by four fifths in number and value of the creditors, but before it was allowed by the chancellor, upon a motion to set aside the writ of execution and restore the money levied to the defendant, the court said that it would be directly contrary to the very words of the statute to extend it to an execution against the goods of the bankrupt, and he could obtain no relief. *Cullen v. Meyrick*, 1 T. R. 361.

The court must have referred to the words of this section. By being contrary to the very words of the statute Mr. J. Willes, who delivered the judgment of the court, must have meant that the *very words* of the statute were confined to an execution against the person of the bankrupt.

It is remarkable that an execution against the goods of the bankrupt is in this statute nowhere mentioned; and I presume for this reason that till the bankrupt obtains his certificate all his personal property is the property of his assignees; and it cannot, I conceive, admit of any doubt but that the assignees might have recovered that property against the sheriff just as they recover when the execution takes place between the act of bankruptcy and the commission; and those, who dissented from the allowance

kingdom of *Great Britain* called *England*, the dominion of *Wales*, and town of *Berwick upon Tweed*, and they are

of the commission would have a just ground to petition the chancellor to order the assignees to commence such a suit, or remove them from misconduct.

It should seem too that in every case where the certificate is declared void, the creditor suing ought to have no benefit from his action, for the property acquired by the bankrupt passes to the assignees. And all that he acquires till the day of the allowance of the certificate may be taken possession of by them.

It would therefore be very shameful conduct in them to permit any one creditor to run away with that property, which ought to be divided amongst all the creditors, who have proved under the commission.

Even that property which the bankrupt is possessed of as his own at the time of the allowance of the certificate, may be taken possession of by the assignees, for though the certificate discharges his debts, and gives the bankrupt a power to acquire property for himself from that time, yet it does not reassign or release to him what the assignment had vested in the assignees.

If the bankrupt has real property at the time of obtaining his certificate, which the commissioners had not previously conveyed to the assignees, this certificate does not take away the power of the commissioners over it, and vest it indefeasibly in the bankrupt, but it should seem that the commissioners may convey it to the assignees in the usual manner at any time afterwards.

No case decided in the courts of law or chancery has gone this length, but the principles of law will not I think permit us to stop short of these conclusions.

It is very remarkable that the writer of these observations was called upon the day after he had made them, for the first time, after twenty years experience, to convey to the assignees a real estate, which the bankrupt was seized of when he obtained his certificate.

His colleagues and himself did not hesitate to execute the bargain and sale.

The statute does not point out any remedy for the bankrupt, when his goods are taken in execution, after he has obtained his certificate for a debt previous to the bankruptcy. The statute discharges the debt, and the legislature must have supposed that the court by their

hereby impowered and required, upon application to them for that purpose made, to grant his or their warrant or

ordinary proceedings could protect him from an execution, the foundation of which was removed.

In 1741 the court said, "we are not required by the statute to proceed in a summary way, as to the goods of a bankrupt, though as to his person we are. If the defendant did not obtain his certificate in time, so as to plead it, he may bring an *auditâ querelâ*." *Calcraft v. Swann, Barnes*, 204.

But the proceeding of *auditâ querelâ* is become obsolete and probably will never be revived.

In 1743, the court "held that the goods may be taken: there is no clause in the statute which extends to the goods." *Ashdown v. Fisher, Barnes*, 206."

But upon an application to the court of common pleas in 1799, to have a writ of *fiat facias* and the goods and money levied, because the defendant had obtained his certificate before the execution of the writ;

Ch. J. Eyre said, "by refusing this application we shall drive the defendant to his *auditâ querelâ*, and I take it to be the modern practice, to interpose in a summary way in all cases where the party would be entitled to relief on an *auditâ querelâ*." *Lister v. Mundell*, 1 B. and P. 427.

The validity of the certificate being disputed, the court directed an issue to try whether it would be good under the plea of bankruptcy.

But if the certificate was void, would not in this case the plaintiff's action be unavailing, and ought not the assignees to interfere for the creditors at large?

The bankrupt statutes have made no distinction between joint and separate debts, except that by the 10 Ann. c. 15, s. 3, the certificate of a bankrupt shall not discharge his partner. See *ante*.

But it has long been established, that a certificate under a separate commission discharges the bankrupt from his joint debts, and a certificate under a joint commission discharges him from his separate debts. *Horsey's case*, 3 P. Wms. 23. *Howard v. Poole, Dav.* 431. *Wickes v. Strahan*, 2 Str. 1157.

Joint creditors cannot prove under a separate commission for the purpose of receiving a dividend; except only when they are petitioning creditors; or in the cases mentioned under sect. 33.; but it is the constant practice for them to petition the chancellor to be allowed to prove, for

warrants under his or their hands and seals, for the taking and apprehending such person or persons, and him,

the purpose of assenting to or dissenting from the certificate. As this petition is never refused, there seems to be something extraordinary in not permitting the commissioners to do it in the first instance.

One general order would have the effect of ten thousand special orders, and without any probability of inconvenience.

Under a joint commission a separate creditor proves of course, but he has no dividend unless there is separate property, or there is a surplus of the joint, yet he has an interest in the discharge of the bankrupt, and assents to or dissents from his certificate. See order, 8th March 1794.

Lord Hardwicke has said, "that the privilege of creditors to come in, and bankrupts to be discharged from debts is co-extensive and commensurate, and very equitable." *Ex parte Groom*, 1 Atk. 115.

But we have seen that this is not true of costs which accrue after bankruptcy.

So also it is not true of debts due to the crown, for the bankrupt's certificate is no discharge of them. The king is not bound by the bankrupt statutes, not being named, *Rex v. Pixley*, Bunb. 202. *Anon.* 1 Atk. 232.

But he may take advantage of them, and it is now the common practice for the officers of the crown to prove debts due to the king under the commission.

See this subject more fully considered under sect. 30, post.

If one partner becomes a bankrupt, and the other pays the partnership debts with his own money, the bankrupt is liable to pay his proportion afterwards, notwithstanding his certificate; for this was not a debt, which could be proved under his commission. *Wright v. Hunter*, 1 East. 20.

If a man marries a woman indebted, and becomes bankrupt and obtains his certificate, he is discharged from his wife's debts, *dum sola*, because they might have been proved under his commission. *Miles v. Williams*, 1 P. Wms. 249.

He is discharged by his certificate from an attachment for not paying money according to an award made before the bankruptcy. The court said this was a demand for which debt would lie. *Baker's Case*, 2 Str. 1152.

But the certificate is no discharge in an action of trespass for mesne profits; for the damages there are uncer-

her, or them to commit to the common gaol of the county, where he, she, or they shall be so apprehended and

tain, and could not be proved under the commission. *Goodtitle v. North, Doug.* 562.

But if the action had been for use and occupation, as the amount of that might have been proved under the commission, though to be settled by the commissioners, as the value of goods sold at no specific price, the certificate would have been a discharge.

Where the owner of an article may bring trover for it, if he who is possessed of it converts it into money, the owner may affirm that act, and consider him his agent, and may waive the tort, and bring assumpsit at his election. If trover is brought the certificate is no bar, if assumpsit is brought the certificate is a discharge.

As where Johnson had deposited with Spiller for his accommodation an ordnance debenture, who pledged it for a sum of money, and became bankrupt, and obtained his certificate. Johnson redeemed the debenture, and brought an action of assumpsit against Spiller, for the sum he paid and Spiller received; it was held his certificate was a discharge. *Johnson v. Spiller, Doug.* 167.

But where the plaintiff was the owner of a bill of exchange, and intrusted it to the care of the defendant, in order that when it became payable he should obtain payment, and in violation of his trust, he discounted the bill and applied the money to his own use, the owner brought an action of trover, and the defendant pleaded bankruptcy. Lord Kenyon and the court held clearly that the certificate was no discharge. *Parker v. Norton, 6 T. R.* 695.

To this section belongs the consideration of the liability to perform a promise or engagement to pay a debt, which had been discharged by the bankrupt's certificate.

If the engagement is made by a bond or sealed instrument, the bankrupt would clearly make himself liable, as no consideration is necessary.

But the pre-existing debt, though discharged by the certificate has been held a good legal consideration for a simple contract written or parol.

Lord Mansfield has said, "a bankrupt may undoubtedly contract new debts; therefore, if there is an objection to his reviving an old debt by a new promise, it must be founded upon the ground of its being *nudum pactum*."

taken, there to remain until he, she, or they be removed by order of the said commissioners, or the major part of

As to that all the debts of a bankrupt are due in conscience, notwithstanding he has obtained his certificate : and there is no honest man who does not discharge them, if he afterwards has it in his power to do so. Though all legal remedy may be gone, the debts are clearly not extinguished in conscience." *Trueman v. Fenton, Coop.* 544.

That was not a case, where the promise was made after the certificate was obtained.

In that case the bankrupt was indebted upon two promissory notes for sixty-three pounds each ; after the commission, and before his certificate, these two notes were taken up and cancelled, and one was given for sixty-seven pounds. The plaintiff proved nothing under the commission. It was held he might recover upon the note for sixty-seven pounds.

In another case where the defendant was in execution after a commission had issued against him. Soon after, in order to regain his liberty, he gave the plaintiff a bond and warrant of attorney to confess judgment for the whole debt.

The bankrupt obtained his certificate, and the bond and warrant of attorney having been put in force ; upon a motion to be discharged, as the debt might have been proved under the commission :

" Per Curiam. This certainly is to be considered in the light of a new debt arising upon a new consideration, because the bond and warrant of attorney were given in order to procure the defendant's liberty. The old debt was thereby extinguished. That point was determined in the case of *Vigers and Aldrich*, and in *Jacques and Withy* in the Term Reports. This is the same as if a new promise had been given for the same debt, upon the same consideration, even after a certificate obtained ; which would operate as a new debt because the old debt still remained in equity." *Birch v. Sharland*, 1 T. R. 715.

The word *equity* here means moral abstract justice, not equity as administered in courts of equity.

Lord Mansfield thought that payment of interest upon a bond by a bankrupt after his certificate, amounted to a fresh promise to pay. *Alsop v. Brown, Doug.* 282.

If the bankrupt after his certificate promises to pay when

them, by warrant under their hands and seals; and the gaoler or keeper, to whose custody such person or persons Gaolers to give notice to commissioners.

he is able, the plaintiff must prove his ability, though Lord Loughborough unaccountably was of a different opinion. *Besford v. Saunders*, 2 Hen. Bl. 116.

If a bankrupt is arrested upon a fresh promise the court will discharge him upon common bail. *Bailey v. Dillon*, 2 Burr. 736.

Lord Kenyon held at *nisi prius*, where the defendant pleads generally his bankruptcy, that the plaintiff might give the promise subsequent to the certificate in evidence. *Williams v. Dyde*, Peake 68.

That general plea puts the validity of the certificate in every instance in issue; but this seems rather hard upon a bankrupt, as it may be entirely a surprize upon him, and he may have no opportunity to answer or repel the evidence.

And if the original contract was only obligatory in writing, there seems to be some inconsistency that it should be revived by parol.

An important question arises upon these debts discharged by the certificate, and voluntarily revived by a fresh promise of the bankrupt, and which I do not find has yet been decided, viz. whether under a second commission, they shall be proved and have a dividend with the new creditors for a valuable consideration.

Lord Hardwicke has said, "if a bankrupt applies to an old creditor, after a discharge by certificate to lend him a new sum of money to carry on his trade, or to become a security for any office; I am inclined to think that this ought to be a good consideration for his giving bond for the remainder of the old debt, and that he ought to be admitted a creditor for the whole debt under the second commission; but I will not be bound down by this opinion, though, as I am at present advised, I think it would be so." *Ex parte Burton*, 1 Atk. 255.

In such a case as a commissioner I should think myself bound by the 21 Jac. 1. c. 19. s. 9. that most important but much neglected and injured section, to admit the bond only for the value the bankrupt had received since he began to contract fresh debts. That great pillar of the bankrupt fabric intended that no specialty, judgment, &c. should be admitted for more than a *rateable part* of

shall be committed, is hereby required to take and receive such person or persons into his custody, and forthwith

the just debt without respect to the greater sum contained in it; and that those creditors, who might have a good consideration against the bankrupt himself, should only have a share of the remainder of the bankrupt's property with the other creditors, in proportion to the real and substantial effects which they had respectively contributed to it.

It would be in the highest degree honest and conscientious for the bankrupt to pay his former creditors from his own acquired property; but it would be quite the reverse to rob the second class of creditors to pay the first, who probably would be his near relations or particular friends.

If the first class in this case divide with the second the bankrupt is generous only with another's property, and it is a species of generosity quite irreconcilable with justice.

Lord Redesdale decided in the court of chancery in Ireland that "the proper order to make in case of a voluntary bond is not to expunge it, but that it shall not be set up against the creditor; but if there be a surplus after payment of all joint and separate debts, the party shall be allowed to come in." *Assignees of Gardner v. Skinner*, 2 Sch. and Lef. 228.

No one entertains a higher opinion of the learning and judgment of the late chancellor of Ireland, than myself.

I read that proposition with approbation, and have cited it in p. 14 ante. But upon further consideration, I think it is subject to the following objections.

If the chancellor thinks it right not to expunge, it is not wrong for the commissioners to admit, subject to Lord Redesdale's restriction, that no dividend shall be paid upon it. But if the proof of it is admitted upon the proceedings, for its nominal amount, then the creditor of such a voluntary bond must be admitted to vote in the choice of assignees, must assent or to dissent from the certificate, and must have all the other rights of a creditor.

I should therefore submit, that there is more propriety and convenience in a strict adherence to 21 Jac. 1. c. 19, s. 9, and that if a bond, judgment, &c. is entirely gratuitous, and given where there was no existing debt, no proof shall be allowed; and it is better for the creditor substantially, as it probably would be held that the bankrupt

to give notice to one or more of the said commissioners in the said commission named of such person or persons being in his or their custody ; to the intent the said commissioners may send their warrant to such gaoler or keeper (which they are hereby impowered and required forthwith to send) for the delivering such bankrupt or bankrupts to the person or persons named in such warrant, who shall be thereby authorized to convey and bring such person or persons to the said commissioners in order to such examination and discovery, as aforesaid ; and the said commissioners are hereby likewise authorized and impowered, by such their warrant, or any other warrant, to take and seize any the goods, wares, merchandizes, and

was not discharged from the obligation of such a bond by his certificate.

Sir William Grant, master of the rolls, has held that "a bond given for the arrears of a voluntary bond is not to be considered voluntary and gratuitous, like the original bond, which is void against creditors both in the case of death and bankruptcy. But if a bond is given for the arrears, it is a bond for a valuable consideration *Gilham v. Locke*, 9 *Ves.* 612.

To the same effect is *Stiles v. Attorney-general*, 2 *Atk.* 521.

Lord Hardwicke's reason is that an action may be brought for the arrears, therefore the second bond is founded on a valuable consideration.

A man, who had a wife living, married another woman, and to make the latter a compensation, gave her a bond to pay her an annuity ; his Honour said that though it was given from the strongest moral obligation, yet it was not for a valuable consideration, and was void against creditors and in bankruptcy ; but that another bond or agreement to pay the arrears was for a valuable consideration, and might be proved under the commission. *Gilham v. Locke*, 9 *Ves.* 612.

A bond or note given for seduction, as the *præmium pudoris*, cannot be proved, but if given to compromise an action for seduction it may be proved. *Exparte Ward*, 15 *Ves.* 290. *Exparte Mumford*, *Ibid.*, 289.

effects of such bankrupt or bankrupts (the necessary wearing apparel of such bankrupt, or of his wife, or children, only excepted) and any of his, her, or their books, papers, or writings, which shall be then in the custody or possession of such bankrupt or bankrupts, or of any other person or persons, in any prison or prisons whatsoever; any custom or usage to the contrary in any wise notwithstanding. (14)

15. Provided always, and be it enacted by the authority aforesaid, that if any such person or persons, so apprehended and taken, shall within the time or times allowed by this act for that purpose, submit to be examined, and

(14) When the commissioners are informed that the bankrupt is embezzling his property, or is preparing to leave the kingdom, or if he does not surrender himself at the third meeting, or at the enlarged or adjourned time, or whenever they think there is a fit occasion till he passes his final examination, they may make this certificate.

The statute says *in order to such examination and discovery as aforesaid*, which seems to limit the time within which the commissioners are to exercise this power.

In the case of *Ex parte Lingood*, 1 Atk. 240. Lord Hardwicke seems to take it for granted that the commissioners must first summon the bankrupt to attend, and then certify to the judge that he was summoned and refused to attend, and he never once takes notice of the certificate described by the act. The statute requires no such previous summons. And it is now never done in practice as preparatory to the warrant. But upon any representation made to the commissioners upon oath, or otherwise as they shall think proper, the commissioners make this certificate according to this section, and a warrant is obtained now generally from the chief justice of the King's Bench.

Every judge or justice of the peace is bound to grant this warrant upon application, but the warrant from one of the judges of the King's Bench is preferable, because that may be executed immediately in every county in England. A warrant from a justice of peace must be

in all things conform, as if he, she, or they had surrendered, as by this act such bankrupt or bankrupts is or are required, that then such person, so submitting and conforming, shall have and receive the benefit of this act, to all intents and purposes, as if he, she, or they, had voluntarily come in and surrendered himself, herself, or themselves; any thing herein contained to the contrary thereof in any wise notwithstanding. (15)

16. And be it further enacted by the authority aforesaid, Commissioners may examine the bankrupt touching his trade, &c. That it shall and may be lawful to and for the said commissioners, or the major part of them, to examine as well by word of mouth, as on interrogatories in writing, all and every person and persons, against whom any commission of bankrupt is or shall be awarded, touching all matters relating to the trade, dealings, estate, and effects of all and every such bankrupt and bankrupts, and also to examine, in the manner aforesaid, all and every other person duly summoned before, or present at, any meeting of the said commissioners, or the major part of them, touching all

executed in his own county only, but his warrant, I conceive, might be indorsed by a justice of any other county, in which it was to be executed, according to the 24 Geo. 2. c. 55.

Or where the bankrupt was likely to be followed into different counties, the commissioners might execute their certificate three or four times over, so that a fresh warrant might be obtained in any county where it was wanted.

The form of the warrant is given in *Burn's Justice*, title Bankrupt.

After the warrant is obtained, it is not uncommon to advertize the bankrupt, and offer a reward for his apprehension.

(15) If the bankrupt is brought in by such a warrant within the forty-two days, or the enlarged or adjourned time, and he afterwards conforms, he may obtain his certificate.

But if he is brought in after that time, the commissioners cannot certify that he has conformed.

Persons not answering interrogatories of commissioners to be committed.

matters relating to the person, trade, dealings, estate, and effects of all and every such bankrupt and bankrupts, and any act or acts of bankruptcy committed by him, her, or them, and also to take down or reduce into writing the answers of verbal examinations of every such bankrupt, or other person, had or taken before them as aforesaid; which examination, so taken down or reduced into writing, the party examined shall and is hereby required to sign and subscribe: and in case any such bankrupt or bankrupts, or other person or persons, shall refuse to answer, or shall not fully answer to the satisfaction of the commissioners, or the major part of them, all lawful questions put to him, her, or them, by the said commissioners, or the major part of them, as well by word of mouth, as by interrogatories in writing, or shall refuse to sign and subscribe his, her, or their examination so taken down or reduced into writing as aforesaid (not having a reasonable objection either to the wording thereof, or otherwise, to be allowed by the said commissioners) it shall and may be lawful to and for the said commissioners, or the major part of them, by warrant under their hands and seals, to commit him, her, or them to such prison, as the said commissioners, or the major part of them, shall think fit, there to remain without bail or mainprize, until such time as such person or persons shall submit him, her, or themselves to the said commissioners, and full answer make to the satisfaction of the said commissioners to all such questions, as shall be put to him, her, or them, as aforesaid, and sign and subscribe such examination as aforesaid, according to the true intent and meaning of this act. (16)

(16) The 4 and 5 Ann. c. 17. s. 3. and the 5 Geo. 1. c. 24. s. 6. provided clearly that witnesses might be brought before the commissioners by their warrant to prove any act of bankruptcy of the bankrupt.

This section is intended to correspond with the 5 Geo. 1. c. 24. s. 6. each following the two sections respecting the apprehension of the bankrupt.

17. Provided always, That in case any person or persons Questions to be particularly specified in the warrant.

But this introduces the examination of the bankrupt; and any other person may be examined, *touching all matters relating to the person, trade, dealings, estate, and effects, of every bankrupt*, besides the act of bankruptcy to which the former act is confined.

When the witness is present, the commissioners may compel him to answer to all these matters under the penalty of commitment.

But the important question is, whether the legislature intended by this section to give the commissioners the same power of *compelling* the attendance of the witnesses, which they had by the expired statutes.

It appears any person present at any meeting, though not duly summoned, may be compelled to answer all lawful questions put to him.

And the commissioners shall examine every other person *duly summoned before any meeting of the commissioners, touching all matters, &c. and in case such person shall refuse to answer all lawful questions put to him*, it shall be lawful for the commissioners to commit him.

The question then becomes reduced to this, whether the words *shall refuse to answer*, include within them, *shall refuse to come to answer*. If they did not, the words *duly summoned* would have been superfluous, for every person present may be compelled to answer. And if it depends upon his pleasure whether he will be present or not, it would be in a great degree useless to *duly summon* him, and quite so to introduce the words into the statute. I should therefore be inclined to think that the legislature intended here to give the commissioners the same power over witnesses which they clearly had by the expired statutes, but that the person who composed this statute has unfortunately rendered it obscure by the affectation of too great brevity.

It is very remarkable that this section has never been referred to by the counsel or the court, in the different applications to the chancellor to compel the attendance of witnesses to support the commission.

This section gives the commissioners power to examine, but the words, *upon oath*, are here omitted; but as all former examinations are upon oath, surely it would be presumed that the commissioners had the power to commit, if the party refused to be sworn, and that he would be guilty of perjury if he swore falsely.

shall be committed by the said commissioners for refusing

Where a witness, summoned before the commissioners at the opening of the commission, in order to prove the trading and act of bankruptcy, refused to attend; upon an application to the chancellor, Lord Eldon ordered him to attend, upon a threat of commitment for contempt if he refused; stating that he had that jurisdiction as a necessary consequence of his power to issue the commission; which would be nugatory if such a power was not incident to it. And he observed, it will turn out, I believe, that the great seal has exercised authority analogous to this, and if so I will not give up the authority. *Ex parte Lund*, 6 Ves. 781. *Ex parte Higgins*, 11 Ves. 8.

But the deficiency of jurisdiction in all the courts to compel the attendance of witnesses is very striking. The chancellor can compel no one (except the parties) to make an affidavit in any petition in bankruptcy before himself, however important the evidence might be. The court of King's Bench have no power upon a motion, in either a civil or criminal subject, to compel a witness to make an affidavit of what he knows, though the communication may be of the most serious concern to the interests of justice.

The only instance, in which the courts of law compel a person to make an affidavit, is that of a subscribing witness.

The court of King's Bench, upon such an occasion, observed, that *every witness does by his signing undertake to prove it when required*. *Clark v. Elwick*, 1 Str. 1.

I once knew some most respectable magistrates bring a pauper before them by their warrant, to support an order of removal; he brought an action against them, and upon the best counsel they could obtain they were glad to tender him sufficient amends. These considerations have induced me to doubt whether a power is vested anywhere to compel the attendance of witnesses in bankruptcy, except as far as it is given by the legislature in this and the preceding statutes.

And that doubt strengthens my opinion, that it was the intention of the legislature that the commissioners should have the power of committing the party duly summoned, who refused to come to answer. But as I have no inclination to back my opinion by a law suit, as a commissioner, I shall always advise the petitioning creditor to get an

to answer, or not fully answering any question or questions

order from the great seal to bring a witness, who refuses to obey the summons of the commissioners.

All persons, who are known or suspected to detain the bankrupt's effects, or to be indebted to him, may be brought before the commissioners by their warrant, by 1 *Jac. c. 15. s. 10. See ante p. 30.*

To prove the act of bankruptcy and the trading, which are only material at the first meeting, or the opening of the commission, the parties must be summoned and examined under this section; though it mentions also *dealings, estate and effects*; yet with respect to them, in almost every instance, the witness may be compelled to answer under the statute 1 *Jac.* which gives the commissioners powers sufficiently large.

These examinations are called private meetings, which are very frequent, and of great importance. The object in general is to compel a discovery by a confession of the party, which in every court will be evidence against himself. The jurisdiction of the commissioners in this instance is much more extensive than that which the court of chancery possesses.

The reason is obvious. The commissioners have their authority from the legislature, and it is given to them alone. The court of chancery must act according to the ancient universal principles of the court.

"The plaintiff's bill is to have the defendant's answer in chancery, where he pleaded, that he had no goods of Portman's, but such as he really paid for before the commission issued against Portman, and that he had no notice of any act or thing by Portman, whereby he was a bankrupt, but truly paid for what he bought."

Lord chancellor ruled the plea good, saying, it is an infallible rule that a purchaser for valuable consideration, shall never without notice discover any thing to hurt himself. *Perrot v. Ballard*, 1681. 2 *Ch. Ca.* 72.

This must have been before Lord Nottingham. And in the same book it is also as clearly reported that Lord Keeper North held the same plea good. *Anonymous*, 2 *Ch. Ca.* 136, 156.

The assignees could therefore have no relief in equity.

But it is the duty of the commissioners at a private meeting to compel the purchaser instantly to declare the precise day when he bought them; and if that day was subsequent

put to him, her, or them, by the said commissioners by

to the act of bankruptcy, then the assignees upon that evidence may recover the goods or their value in a court of law, unless he is protected by the 46 Geo. 3. c. 135. s. 1.

The commissioners cannot compel the witnesses to confess themselves guilty of crimes; but it should seem they may compel them to confess every circumstance respecting the bankrupt's property, which would enable the assignees to recover it.

Lord Erskine has said, the commissioners, of their own authority, may examine parties, and make them confess the infirmity of their title; and why may not the lord chancellor, administering the bankrupt laws, especially where the party comes in as this party does, by the effect of the agreement I have stated, consenting to make the disclosure; and not pleading a purchase for valuable consideration without notice. *Ex parte Herbert*, 13 Ves. 189.

But when the party does not consent to a discovery, and pleads a purchase for valuable consideration without notice, a court of equity cannot compel him to make that discovery, but it is peculiarly the duty and the jurisdiction of the commissioners for the benefit of the creditors to do it. The reason for the difference, I hope I have correctly stated.

By 21 Jac. c. 19. s. 9. the commissioners may examine any person for the finding out the truth and certainty of the several debts due to such creditor as shall seek relief. By virtue of that section the commissioners admit the deposition of the creditor himself, but they examine him as far they think necessary, *viva voce*; and if there is any doubt, they examine the bankrupt also, or any other person.

In the case of a corporation like the bank, they admit the proof to be made by a clerk or accountant.

Where a creditor is insane, or in such a situation as not to be able to appear, or to transmit a deposition, the commissioners may admit the proof upon the evidence of any clerk or other person, who can satisfy the commissioners of the existence of the debt, especially if it is admitted by the bankrupt upon his oath.

Until Bullock's case it was the general practice, at the opening of a commission, to ask the witnesses, who came to prove the trading and act of bankruptcy, whether they were creditors of the person against whom the commission

word of mouth, or on interrogatories, that the said commissioners shall, in their warrant of commitment, specify

had issued; and if they answered in the affirmative their evidence was rejected, unless the petitioning creditor undertook to pay them the amount of their debt, or they undertook not to prove under the commission; but this was always done by a parol engagement only. But since Bullock's case, in which the witness at the opening of the commission was a creditor, and it was held that the validity of the commission was not affected by that circumstance, my colleagues and myself have ceased to enquire whether the witnesses are or are not creditors. See *ante*, p. 124.

And that practice is now fortified by the opinion of Lord Ellenborough at *nisi prius*. Upon an issue directed by the lord chancellor to try the validity of a commission, an objection was made to the evidence of a creditor, who had not proved under the commission, and who was called to prove the trading; Lord Ellenborough said, "a creditor is clearly an incompetent witness to increase the fund out of which he may receive a dividend; but I do not see why he should not be allowed to prove what barely goes to support the commission, *of which he has not availed himself*. It may be quite as advantageous for him to be allowed to sue his debtor, as a solvent person, as to receive a dividend under a commission of bankrupt sued out against him." *Williams v. Stevens*, 2 Camp. 300.

If this is true upon an issue, it must be true also upon opening the commission, the principle and reason seem to be precisely the same.

The section gives the commissioners power to examine *every person*; but this I presume must be subject to the general rules of evidence, for though the petitioning creditor, like all other creditors may prove his own debt before the commissioners, yet he would not, I apprehend, be held to be a good witness to prove the trading and act of bankruptcy, his interest to support the commission being too palpable.

Besides the liability to answer the obligation of his bond and bear the expence of the commission if he fails, he is reimbursed, if he succeeds.

The chancellor made an order upon an attorney to attend the commissioners at the opening of the commission, but *without prejudice to any objection to be made by the witness before the commissioners*.

The objection was this, viz. that he knew of no circum-

such question or questions. (17) (For this note, see page 192.)

stances except what came to his knowledge professionally. *Ex parte Higgins*, 11 Ves. 8.

It is difficult to say what knowledge an attorney could acquire professionally from a bankrupt, which he would not be compellable to disclose. If a trader consulted him upon the consequences of an act of bankruptcy, still he would be compellable, in my opinion, to disclose all he knew respecting an act committed; if he was in possession of a deed of assignment of all his effects, which he drew, or was a witness to, he might be compelled to produce it, or to prove the execution.

Lord Kenyon admitted an attorney, who proposed a bond and mortgage deeds, to prove the consideration was usurious; and he justly observed, "where any thing is communicated to an attorney by his client, for the purpose of his defence, he ought not to divulge it; but where he himself is, as it were, a party to the original transaction, that does not come to his knowledge in the character of an attorney, and he is liable to be examined as any other person." *Duffin v. Smith, Peake's N.P.* 108.

But it may be very inconvenient to have no other witness than a creditor, either at the opening or upon an issue, for the assignees cannot recover any of the bankrupt's property by the testimony of creditors, unless they obtain a release from them, which they must purchase probably upon unfavourable terms. Lord Hardwicke held it was not necessary they should give a release to the bankrupt. *Ambrose v. Glendon, Cas. temp. Hardw.* 267.

Now by 49 Geo. 3. c. 121, s. 14. their proof under the commission is a release of the bankrupt.

But a creditor cannot be admitted to prove that the certificate is void, both because the bankrupt thereby would lose his allowance, and the dividends would be increased by the future acquisitions of the bankrupt. *Shuttleworth v. Bravo*, 1 Str. 507.

This section has very cautiously avoided giving to the commissioners a power of examining the bankrupt at any time, respecting his act of bankruptcy. They may examine him respecting his trading.

What a bankrupt declares at the time of committing an act of bankruptcy is always received in evidence, when proved by another person, both before the commissioners, and in actions by the assignees. But these declarations have been greatly, I conceive, misunderstood or misrepresented.

18. Provided also, That in case any person or persons committed by the commissioners warrant, by virtue of ^{if habeas corpus be brought on such commitment,}

sented. They must accompany the act: for when words and actions are cotemporaneous, they constitute one transaction, they are together one *res gesta*, and the words are evidence of the reason of the act or the intention of the actor. But it would be a strange inconsistency to permit the reason of a man before or after an act to be given in evidence by hearsay, which he himself could not prove upon his oath.

Lord Hardwicke has said, it is not usual to allow such evidence, unless when it is *concomitant with facts*, as what the bankrupt says when he is removing his books, or his goods, &c. but not else. *Ambrose v. Clindon, Annals*, 267. 1734.

What Lord Kenyon and the court said in the case of *Bateman v. Bailey*, 5 T. R. 512, has, I conceive, led many into error upon this subject.

Percuriam, "Although the bankrupt cannot be called as a witness to prove his own act of bankruptcy, yet it never was doubted, but that which was said by him *at the time*, in explanation of his own act, may be received in evidence. An admission by him, before his bankruptcy, of a debt due to another, is sufficient to charge his estate. If he be absent from his home, an admission, by him, that he had been abroad to avoid his creditors, is good evidence. Whatever he says, in short, before his bankruptcy, is evidence explanatory of the act done by him. In this instance, he absented himself from home under suspicious circumstances, for which his reasons were asked; and without doubt it was competent to inquire of the witness, to whom he communicated them, what those reasons were."

But the argument of the counsel in that case seems to be so satisfactory and convincing, that there is the greatest probability, that it will ever be considered more correct than the judgment of the court.

Law now shewed cause against the rule, "contending that the evidence if received would, if it proved any thing, have amounted to an admission by the bankrupt, that he had committed an act of bankruptcy; but that as he could not prove that himself, so neither could his admission of it be proved by any other witness; otherwise a great door would be opened to fraud, and the wisdom and policy of that rule of law be entirely defeated. That, of the two, it

this or any other acts now in force concerning bankrupts, shall bring any *habeas corpus*, in order to be discharged

was even less dangerous to hear the bankrupt's own account of it upon his oath, than his bare relation of it, at second hand, to third persons."

The question in the case seemed to be this, whether it should be proved what the trader said after he had returned home on the same day, as the reason for his departure?

If the court intended to say that what he declared after his return was complete, and when he was doing no act connected with it, it is presumed the decision cannot be supported.

Whilst he is preparing to go, or in the act of going, and during his absence from home, and whilst he is returning or unpacking his portmanteau, &c. what he says is part of the act of bankruptcy; but when he is only meditating a future act, or speaking of a past one completely finished, his words surely can have no more legal operation than those of any other man.

The evidence of a departure from the dwelling house, before the writer and his colleagues has always been thus. A witness, an inmate, either proves that he was not in his dwelling house as usual for a certain time, or a witness proves his actual residence in another house or place for that time; then the trader's declarations, proved by the same or some other witness, qualified as above, will satisfy the commissioners of the act of bankruptcy.

Or without any declarations of the bankrupt himself, the commissioners, like a jury, may draw the conclusion of his *intent*, from evidence of his circumstances, conduct, &c.

Mr. J. Chambre, as counsel in the case of *Bateman v. Bailey*, said that it was in daily practice to call the bankrupt's clerk to prove that his master had given him orders to deny him to any creditor. Perhaps that may be answered by observing, that if the previous order to deny is never counteracted, it is the same as if the order had been made at the moment of denial.

"It was held that no release could make the bankrupt a witness to prove his own act of bankruptcy." *Field v. Curtis*, 2 Str. 829. 2 Geo. 2.

This is the whole of the report, and no reason is suggested for the holding of the court.

The commissioners have no power over the bankrupt, but what the statutes give; and they give no power to examine him concerning the act of bankruptcy.

from any such commitment, and on the return of any such *habeas corpus*, there shall appear any such insufficiency

But the reason why he should not be permitted to support his own commission, must be the danger of the admission of fraud.

It was therefore upon the same principle held unanimously by the court of common pleas, that the bankrupt could not be admitted to prove the petitioning creditor's debt, or any of the facts necessary to support the commission. *Chapman v. Gardiner*, 2 Hen. Bl. 279. 1794.

What Lord Kenyon, therefore, held in *Bateman v. Bailey*, ante, and in *Dowton v. Cross*, 2 Esp. 168, at *nisi prius*, cannot be correct; that the admission or declaration of the bankrupt, before suing out the commission, that he owed the petitioning creditor above 100l. has been held sufficient evidence of the petitioning creditor's debt. What, by no release, he can prove himself upon oath, surely never can be proved by his loose conversation with others.

Lord Kenyon is said to have admitted, at *nisi prius*, a bankrupt to be called, to prove whether he had committed an act of bankruptcy, when it was before doubtful. *Orlade v. Perchard*, 1 Esp. 287.

But it is said that Lord Ellenborough and Ch. J. Mansfield have both at *nisi prius* overruled that authority.

It is clearly irreconcilable with *Chapman v. Gardiner*.

A bill was filed, praying that the defendant might set forth, whether he did not, for many years previous to the year 1782, carry on trade as merchant, and whether he had not committed the several acts of bankruptcy specified in the bill, or some of them. The defendant put in a demurrer to so much of the bill as prayed a discovery of the trading and acts of bankruptcy. "Lord Chancellor Loughborough overruled the demurrer, as extending to the trading as well as the act of bankruptcy, to which it should have been confined; but said he did not mean it should be understood that the defendant could be asked as to an intention to defraud." *Chambers v. Thompson*, 4 Bro. 434. 1793.

This may be reconciled with *Chapman v. Gardiner*; for though this discovery with respect to the trading might be used against the bankrupt himself, yet it could not be given in evidence in an action against others.

And it is also conformable to the power of the commissioners by this section; they may examine the bankrupt with respect to his trading, dealing, &c., but not with respect to the act of bankruptcy.

whatsoever in the form of the warrant, whereby such person was committed, by reason whereof the party might

It should seem too under this section, that when the act of bankruptcy was proved by another witness, the commissioners have the power to examine *the person against whom any commission is awarded, touching the trade, dealings, &c. of such bankrupt.*

All these words are equally applicable to a bankrupt before the adjudication of the commissioners as afterwards. If the statute had intended that the bankrupt should be examined only after he was adjudged a bankrupt, it would have used the words in the first section, after commission, *viz. and hereupon such person shall be declared a bankrupt.*

There is no point upon which the commissioners are so liable to be imposed upon, as upon the *trading* of the bankrupt. If that were doubtful, they might derive important information from the bankrupt himself; and with regard to him it should seem the consequences might be the same, both with respect to the penalties and the continuance of the commission, whether he was examined by the commissioners at one time or another. But I must confess I never knew this done; and it is only suggested to my mind now, for the first time, by a minute examination of the words of the statute.

Having observed a difference of opinion amongst the gentlemen, who have published very useful works upon the bankrupt law, whether the commissioners have any authority to examine the bankrupt beyond the forty-second day, or the time enlarged by the chancellor; or whether the commissioners can enforce an examination of the bankrupt after what is called the *last examination*, I shall simply state my observations upon the subject without presuming to disapprove of any former opinion.

The commitment, in Perrot's case, seems to have been on the day, to which the time was enlarged by the chancellor's order.

But it is the constant practice for the commissioners to adjourn the examination, whenever they think it necessary, or whenever the assignees wish it, to some future day; and this they seem authorized to do by the words of the first section. "Within forty-two days, the bankrupt shall surrender and submit to be examined *from time to time.*" If he appears on the forty-second day, then he must submit to be examined on that day, and from *time to time* till the discovery of his estate and effects is complete.

be discharged of such commitment; that then it shall and may be lawful for the court or judge, before whom such

The commissioners adjourn from time to time, and that section more than once uses the words, *such examination*, in the singular number. The whole is his examination; and when the commissioners have no further reason to adjourn the examination, the bankrupt then has passed his last or final examination.

At any time after that the creditors and commissioners may sign the certificate of his conformity; but before the end of the adjournment they cannot sign. The bankrupt has his protection from arrest till that day. See 5 Geo. 2. s. 5.

The last or final examination means the examination on that day, after which the commissioners can sign his certificate, and before which day, if it were signed it would be a nullity.

But still the legislature contemplated, that the commissioners might have occasion to examine the bankrupt and all other persons; till the distribution was finally closed, or even afterwards, whilst there was an expectation of recovering more to distribute; it has therefore given the commissioners the power described by this section.

This statute seems to have virtually repealed the 1 Jac. 1. c. 15. s. 6 and 7; for the bankrupt under that statute must be apprehended by a warrant after five proclamations. See p. 27.

But the examination of the bankrupt, under this section, may be at any time, either before or after his certificate, as long as the justice due to his creditors, requires any information from him touching *his trading, dealings, estate or effects*.

By the 21 Jac. 1. c. 5, the bankrupt's wife may be examined, with respect to the concealment of her husband's effects; but in 1719, Lord Chancellor Parker decided that she could not be examined touching the act of bankruptcy of her husband under the 5 Geo. 1. c. 24. s. 6, the then existing statute. *Ex parte James*, 1 P. Wms. 610.

The words of that statute being as general as the words of this statute, it follows that she cannot now be examined respecting her husband's act of bankruptcy.

The object of private examinations is frequently to obtain a discovery of the circumstances under which the party examined became possessed of the bankrupt's pro-

the judge may
recommit the
prisoner.

party shall be so brought by *habeas corpus*, as aforesaid, and such court or judge shall, and is hereby required, by

party ; so that the discovery may be made use of as evidence of confession in an action brought against the party.

Where such examinations had been taken, and a bill had been filed also for a discovery, the party petitioned the chancellor to make an order, that he might see his deposition before the commissioners, that his answer might be consistent with it.

But Lord Hardwicke refused the motion, justly observing that "*truth is always uppermost ; they must swear at their peril.*" *Boden v. Dellow*, 1 *Atk.* 289.

The party examined is always permitted to examine his deposition, and to make proper corrections before he finally signs it.

The chancellor will not restrain the examination of commissioners, or make any order with respect to the attendance of counsel, but will leave these matters to the discretion of the commissioners. *Ex parte Parsons*, 1 *Atk.* 204. *Ex parte Blund*, 1 *Atk.* 205.

A barrister or solicitor is generally or always permitted to attend a bankrupt or a witness ; and their presence may give information to the commissioners or produce caution : but the commissioners must take care not to be influenced or intimidated from the discharge of their duty ; and if the counsel or legal adviser were to interfere improperly, the commissioners may unquestionably proceed in the examination in their absence.

It is a general rule that no one shall be compelled to criminate himself, yet it appears that a bankrupt in his last examination, may be compelled to answer what might subject him to penalties for gaming, or trading as a smuggler or a clergyman. *Ex parte Meymot*, 1 *Atk.* 200. *Ex parte Barr*, *Cooke* 437.

For a bankrupt ought not to protect himself from making satisfaction to his creditors, by offences of this nature against the public.

Where a party at a private examination admitted he had received the bankrupt's property, but refused to account for the application, as the answer might implicate him in the consequences of criminal prosecution ; Lord Eldon said, " no one is bound to criminate himself. But if any one has received the bankrupt's money, for which he is *primò facie* liable, if he says, I cannot account for it but by

rule, order, or warrant, to commit such person or persons to the same prison, there to remain as aforesaid, until he, she, or they shall conform as aforesaid, unless it shall be made appear to such court or judge, by the party commit-

confessing myself subject to penalties, he ought to be liable for it, as he admits it is still in his hand. *Ex parte Symes*, 11 Ves. 521.

"In trover the defendant was charged with his confession, in a deposition taken before commissioners of bankrupt; and the chief justice refused to let the defendant into any *parol* evidence to explain it." *Wilson v. Poulter*, in Middlesex, coram Raymond, C. J.

At a private examination, the party must be permitted to correct or explain any answer before he finally signs it; but it frequently happens that the party or his counsel wish to introduce into the deposition some narrative not connected with the answer to any question, but intended to destroy the effect of the answers, when they are read together to a jury; this, as a commissioner, I have constantly opposed, as the statute only empowers us to take a *full answer to all such questions as shall be* put to the witness; and to insert more in the deposition is, in my opinion, an abuse of the authority of the commissioners, and a perversion of the evidence, which they are authorized to obtain. But I am obliged to say this upon my own authority only, upon a subject, which frequently occurs in practice.

Lord Eldon, after some deliberation, as the application was new, ordered the proceedings to be produced at the hearing of a suit in chancery in Ireland, the intent being to affect the bankrupt by his confession in his examination before the commissioners. The commission had been superseded. *Ex parte Bernal*.

This proves the supersedeas does not cut down every branch or consequence of the commission. This must be true also of depositions taken at private examinations; they may always therefore be admitted as evidence against the parties.

If the commission was superseded, because it was invalid, though the discovery is obtained without legal authority, yet there is no reason why it should not afterwards be applied to the advancement of legal and moral justice; and this furnishes one instance of the maxim, *non debet fieri sed factum valet*.

Gaoler permitting bankrupt to escape shall forfeit 500*l*.

ted, that he, she, or they have fully answered all lawful questions put to him, her, or them by the said commissioners; or in case such person was committed for not signing his, her, or their examination, unless it shall appear to such court or judge, that the party so committed had a good and sufficient reason for refusing to sign the same. And in case any gaoler or keeper of any prison, to whom any such bankrupt or bankrupts, person or persons, shall be so committed, as aforesaid, shall wilfully suffer such bankrupt or bankrupts, person or persons, to escape from such prison, or to go without the walls or doors of the said prison, until he, she, or they shall be duly discharged, as aforesaid, such gaoler or keeper shall, for such his offence, being duly convicted by indictment or information, forfeit five hundred pounds of lawful money of

But the commissioners ought to permit no question to be put, which they cannot compel an answer to.

The following case lately occurred in practice:—the bankrupt was employed by a creditor to receive a sum of money as agent or trustee; with that money he paid a debt of his own; a private meeting was held at the request of the creditor, whose money the bankrupt had so received, and paid, under pretence that the other creditor had received the payment of his debt by an undue preference.

But that creditor was asked by the counsel for the other creditor, “when you received payment of your debt, did not you know that the money you received was not the money of the bankrupt, but the money of Mr. A.?” We objected to the question, thinking that we, the commissioners, had no authority to compel any discovery to assist one creditor against another; but that our authority was confined to such questions and answers only as would benefit the assignees or the bankrupt’s estate.

(17) From this it clearly appears that the commissioners have only the power to commit for not answering such question, as the chancellor or judges shall consider a proper legal question; and therefore it was rightly held that a bankrupt or witness could not be committed for having *notoriously prevaricated*. *Rex v. Nathan*, 2 Str. 880; for they can only commit for the refusal to answer a question, which must be specified.

Great Britain, for the use of the creditors of such bankrupt or bankrupts. (18)

(18) Lord Hardwicke, upon the authority of a case before Lord Chancellor King, held that he could determine the legality of a commitment by the commissioners, upon a petition. *Ex parte Lingood*, 1 *Atk.* 342.

Under a petition he could recommend it to the commissioners, to discharge the prisoner or to continue his imprisonment.

But still, as he himself said in that case, he could not preclude the bankrupt from his *habeas corpus*. It has been said the commissioners cannot of themselves discharge the prisoner; that I conceive is erroneous, every day's practice is to the contrary: if upon a second examination, they are satisfied with his answer, they must order the gaoler to discharge him.

Lord Eldon has properly determined only to examine the legality of a commitment upon a *habeas corpus*; when he is brought up the merits must be heard, not upon a petition but the motion for his discharge.

Taylor's case, 8 *Ves.* 300. *Ex parte Tomkinson*, 10 *Ves.* 106.

Every court at Westminster in the term, and every judge at chambers in the vacation, has the same jurisdiction as the chancellor, in discharging a bankrupt or witness, committed by the commissioners.

Lord Hardwicke has said, "if a bankrupt has an objection to a question he must demur to the interrogatories, and the lord chancellor will judge of the question upon a petition." *Ex parte Meymot*, 1 *Atk.* 199.

I take notice of this proposition as one likely to mislead the student, and unexperienced commissioner. If the bankrupt refuses to answer a question, which the commissioners think him bound to answer, they are bound to commit; and if the question is improper in the opinion of the chancellor, or the judges, he must be liberated by a *habeas corpus*. No petition now is received by the chancellor upon the subject, and in all cases the commissioners must act according to the best of their own judgment, and must not adjourn any proceeding merely to obtain the opinion of the chancellor.

When the creditors are angry with the bankrupt, they are frequently anxious that the commissioners should

Penalty on gaoler refusing to produce his prisoner.

19. And be it further enacted, That the gaoler or keeper of such prison, as aforesaid, shall upon request of any

commit him; but the commissioners have no power to commit for punishment, their authority is merely to obtain a more satisfactory answer to the questions, respecting the discovery of his property.

Lord Mansfield has said, "if a bankrupt swear fully and roundly, and the commissioners have every reason to believe that what he swears is not true, yet they must take it to be satisfactory, provided that it would be satisfactory in case it were true. In the present case, every circumstance tends to shew that the bankrupt has sworn falsely, but the commissioners cannot commit him for false swearing;" and the court ordered him to be discharged. *Pedley's case*, *Leach*, 365, 1784.

But this is now considered as one of the great errors of Lord Mansfield and the court in bankruptcy. And it has been corrected both by Lord Kenyon and Lord Eldon. Lord Kenyon has said "there are no technical rules by which cases of this kind are determined, but the question in each particular case is, whether the answers given by the bankrupt be or be not sufficient to satisfy the mind of any reasonable person." *Ex parte Nowlan*, 6 T. R. 118, 1794.

Lord Eldon also said, in the same case, eleven years afterwards, "the case is reduced to this, whether upon my view of the answers they were satisfactory; and the full persuasion of my mind was, that they were not satisfactory." And the chancellor remanded him.

It was afterwards contended that the commitment and examination could be of no use, as the assignees had recovered the property; upon this Lord Eldon observed, "there is a peculiarity in this case. If the answers are unsatisfactory; though the examination can be of no use, yet, if the commitment is legal, upon the writ of *habeas corpus*, I have no right to discharge the bankrupt."

"If the commitment is legal, I have no discretion to discharge him."

"Whether the commissioners should under such circumstances forbear to commit is a very different question." *Ex parte Nowlan*, 11 Ves. 511, 1805. See also *Langhorn's case*, 2 Bl. 919. *Rex v. Perrot*, 2 Burr. 1122. *Taylor's case*, 8 Ves. 328.

person or persons, being a creditor or creditors of such bankrupt (and having proved his, her, or their debt under

The question whether the commissioners should continue their commitment, when the bankrupt's answer true or false can lead to the discovery of no further property, I should think might be answered by the following considerations. The authority of the commissioners to commit is only to obtain a more satisfactory answer for the benefit of the creditors; when that benefit is fully attained independently of the answer of the bankrupt, the commissioners ought to discharge him, because the question and the answer are no longer necessary.

They ought to withdraw a question which has become inefficacious and immaterial. They have no power to commit for punishment, and it is fitter that he should suffer the judicial penalties of perjury, than the indefinite unavailing imprisonment under the authority of the commissioners.

In the preceding case Lord Eldon observed that "the commissioners have gone upon this ground, that he was bound to tell them whether he had committed a capital felony or not. The chancellor made no observation so as to disclose his opinion upon that point, but as the bankrupt was remanded, we have reason to conclude that he thought the commissioners have a power to compel an answer to such a question. The capital felony is the concealment of his property to the amount of £20. He is guilty of a capital felony in not submitting to be examined, if in this examination he would discover property previously concealed, the felony by concealment would probably be removed; but the whole object of the examination of the bankrupt would be defeated and become nugatory, if the bankrupt would protect himself by saying that you must not ask me if I have concealed any property, and where, because I should criminate myself, and sign my own death-warrant by the answer.

He is clearly not bound to answer any other felony. But the refusal to submit to be examined is itself a capital felony.

Ch. De Grey and the court of Common Pleas, discharged a witness, who in his examination before the commissioners, had answered, *I cannot positively recollect, but I rather believe I bought the two bales of silk by a broker*, and having refused to give any farther explanation of this answer, he was committed by the commissioners.

the said commission, and producing a certificate thereof under the hands of the said commissioners, or the major

Ch. J. De Grey observed, *I think in my conscience he had before sworn to a degree of belief sufficient to answer civil purposes.* *Miller's case*, 3 Wils. 420. 2 Bl. 881. 1773.

Miller afterwards brought an action of trespass and false imprisonment against the three commissioners, who with other pleas pleaded in justification, all the circumstances of the case, to which there was a general demurrer.

In the argument of the demurrer, the principal question was whether commissioners of bankrupt were protected for their acts as judges.

Ch. J. De Grey observed "this is a case without a precedent, and must therefore be determined on principles. Taken in any view, it involves a hardship on either side. Hard that commissioners should be perpetually harassed with actions in case of an innocent mistake; harder for the public, if they are to be invested with an arbitrary power of committing whom, and for what they please without being liable to answer for it."

"It is certain that no man ought to suffer criminally for an error in judgment: but it is equally just that he should make reparation civilly, for the damages which other persons have suffered by such his error." He then proceeded to prove, and the court agreed with him, that the commissioners had not the protection of the superior judges, but that where their warrant was illegal, they were liable to an action of false imprisonment, like a justice of the peace. *Miller v. Seure*, 2 Bl. 1141. 1777.

The conclusion of Perrott's commitment was held to be right, viz. "safely to keep and detain until such time as he shall submit himself to us the said commissioners, or to the major part of the said commissioners by the said commission named and authorised, and full answer make to our or their satisfaction to the question so put to him as aforesaid." *Rex v. Perrott*, 2 Burr. 1122.

All other conclusions, as *till he shall be discharged by due course of law*, or *till he shall answer all such questions as shall be put to him*, or *till he shall conform to their authority*, all these are bad. *Miller's case*, 3 Wils. 420. *Bracey's case*, 1 Salk. 348. *Hollingshead's case*, 2 Lord Ray. 831. *Rex v. Nathan*, 2 Stra. 880.

part of them, which such commissioners are hereby required to give (*gratis*), forthwith produce and shew such person or persons so committed, as aforesaid, to any such creditor or creditors requesting the same; and in case such gaoler or keeper of such prison shall refuse to shew, or shall not forthwith produce such person or persons so committed, as aforesaid, and being in his actual custody at the time of such request, to such creditor or creditors of such bankrupt, requesting to see such person or persons committed as aforesaid, such gaoler and keeper of such prison shall forfeit, for such his wilful refusal or neglect, the sum of one hundred pounds of lawful money of *Great Britain*, for the use of the creditors of such bankrupt or bankrupts, to be recovered by action of debt in any of his Majesty's courts of record at *Westminster*, in the name or names of the creditor or creditors requesting such sight of such prisoner. (19)

20. And be it further enacted by the authority aforesaid, That all and every person and persons, who shall, at any

Allowance to persons making discovery of bankrupt's estate.

When a bankrupt or a witness committed is willing to give a more satisfactory answer, he must communicate that to the commissioners, and the commissioners must appoint a meeting, and in case of the bankrupt at the expense of his estate. *Rex v. Jackson*, 1 T. R. 654. *Ex parte Graham*, 2 Bro. 48.

But the commissioners of their own accord may send for the bankrupt or the witness, and particularly when they wish to liberate him.

The statute enacts that the gaoler in case of an escape shall forfeit £500 for the use of the creditors.

Before this an action on the case lay against a sheriff for suffering one to escape, who was committed by the commissioners of bankrupts, because he refused to be examined. The case of the sheriffs of Bristol. 1 *Roll's Rep.* 47. *Serjeant Goodinge*, 68.

(19) This section suggests no observation, except that I find in the bill of costs in Green's Bankrupt Law, the commissioners take one pound each for the certificate, which the statute declares shall be given *gratis*. *Green*, 380.

time after the time allowed to such bankrupt to surrender and conform, as aforesaid, voluntarily come and make discovery of any part of such bankrupt's estate not before come to the knowledge of the assignees; either to the said assignees, or to the said commissioners, authorized as aforesaid, or the major part of them, shall be allowed five pounds *per centum*, and such further and other reward, as the assignees and the major part of the creditors in value present at any meeting of the creditors shall think fit, to be paid out of the neat proceed of such bankrupt's estate which shall be recovered on such discovery: which shall be paid to the person or persons so discovering the same by the assignee or assignees of such bankrupt's estate; and the assignee or assignees shall be allowed the same in their accounts. (20)

Penalty on persons concealing effects in trust.

21. And for the better discovery of the estate of a bankrupt, be it enacted by the authority aforesaid, That all and every person and persons, who shall have accepted of any trust or trusts, and shall wilfully conceal or protect any estate, real or personal, of any person or persons becoming bankrupt, as aforesaid, from his, her, or their creditors, and not within forty-two days next after such commission shall issue forth, and notice thereof be given in the *London Gazette*, discover and disclose such trust and estate in writing, to one or more of the commissioners or assignees of such bankrupt or bankrupts estate, and likewise submit him or herself to be examined by the commissioners in and by the said commission authorized, or the major part of them, if thereunto required, and truly discover the

(20) It is not unusual to advertize the bankrupt, or the person supposed to conceal the bankrupt's property, and to offer the reward. The assignees ought to do it with so much caution and reason as not to subject themselves to an action for a libel. If the party were innocent, he ought to receive ample satisfaction.

same, shall forfeit the sum of one hundred pounds of lawful money of *Great Britain*, and double the value of the estate, either real or personal, so concealed, to and for the use and benefit of the said creditors, to be recovered by action of debt in any of his majesty's courts of record at *Westminster*, in the name of the assignee or assignees of the said commissioners; in which case full costs shall be allowed to either party. (21)

22. And whereas by an act made in the seventh year of his late majesty's reign, intituled, *an act for the explaining and making more effectual the several acts concerning bankrupts*, persons taking bills, bonds, promissory notes, or other personal security for their money payable at a future day, are enabled to prove their debts under a commission of bankruptcy, but not to petition for or join in petitioning for any new commission, which having been found to be inconvenient: now it is hereby enacted by the authority aforesaid, That so much of the said act, as disables any such person from petitioning for, or joining in any petition for a commission against any person or persons who have before committed any act of bankruptcy, is hereby repealed: and it shall and may be lawful hereafter for such person to petition for, or join in petitioning for any such commission of bankruptcy; any thing in the said act contained to the contrary thereof in any wise notwithstanding. (22)

Persons having
bonds or notes
may petition
for a commis-
sion.

(21) There does not appear to have been any case under this section.

(22) This section enables creditors, who had written securities for debts, payable at a future day, to sue out commissions as well as prove under commissions. Whatever therefore is true of such debts proveable under the commission, will be true of the petitioning creditor's debt, provided it is of the amount required by the next section. See 7 Geo. 1. c. 30, *ante*.

Where goods were sold and delivered upon an agreement to pay for them by a present bill of exchange,

Conditions of
granting com-
missions.

23. And for preventing the taking out commissions of bankrupts maliciously, be it enacted by the authority aforesaid, That no commission of bankrupt under the great seal of *Great Britain*, shall, after the twenty-fourth day of June, one thousand seven hundred and thirty two, be awarded and issued out against any person whatsoever, upon the petition of one or more creditors, unless the single debt of the creditor, or of two or more persons

payable at a future day, but before the bill of exchange was given the vendor sued out a commission of bankrupt against the buyer, the court of King's Bench were clearly of opinion, that the commission was void, and that the vendor, before he was in possession of the bill of exchange could not be a petitioning creditor under this section, or the 7 Geo. 1. c. 30. *Hoskins v. Duperoy*, 9 *East*, 498.

The 49 Geo. 3. c. 124. s. 9, enables all creditors, who have debts payable at a future day, but without a written security, to be admitted to *prove* such debts, as if they had written securities.

But that statute does not enable such creditors to petition for a commission, an omission probably owing to inadvertence, as every creditor who can prove under a commission, ought to be enabled to sue out a commission. It is hard for such creditors to see the bankrupt waste his property, whilst they can have no remedy, but by the aid of others.

Every one, who can petition can prove, but there are many instances of persons who can prove, but who cannot petition.

The powers ought to be made co-extensive.

Green in his *Spirit of the Bankrupt Laws*, p. 81, informs us that "Lord Chancellor Camden established the debt of a *fraudulent* petitioning creditor, for the purpose of supporting the commission for the benefit of the other creditors, and thereby to save the expence of another commission; but ordered the commissioners not to admit him to *prove* his debt under the commission, that he might be excluded from receiving any dividend on his unjust demand."

This is not a mode of reasoning and deciding likely to be adopted again. Could any action, prosecution, the bankrupt's certificate, or any thing which was contested, have been supported on so unstable a foundation?

being partners petitioning for the same, do amount to the sum of one hundred pounds, or upwards; or unless the debt of two creditors, so petitioning as aforesaid, shall amount to one hundred and fifty pounds, or upwards; or unless the debt of three or more creditors, so petitioning as aforesaid, shall amount to two hundred pounds, or upwards: and the creditor or creditors, petitioning for such commission, shall, before the same shall be granted, make an affidavit, or (being one of the people called *quakers*) make a solemn affirmation in writing, before one of the masters of the High Court of Chancery (which oath or affirmation they are hereby empowered to administer, and which shall be filed with the proper officer) of the truth and reality of such his, her, and their respective debt or debts, likewise give bond to the lord chancellor, lord keeper, or commissioners of the great seal for the time being, in the penalty of two hundred pounds, to be conditioned for proving his, her, or their debts, as well before the commissioners named in such commission, as upon a trial at law, in case the due issuing forth of the same shall be contested and tried, and also for proving the party a bankrupt at the time of taking out such commission, and further to proceed on such commission as herein after is mentioned: and if such debt or debts shall not be really due owing, or if after such commission taken out it cannot be proved that the party was a bankrupt at the time of the issuing of the said commission, but on the contrary it shall appear, that such commission was taken out fraudulently or maliciously, that then the lord chancellor, lord keeper, or commissioners of the great seal for the time being, shall and may, upon petition of the party or parties grieved, examine into the same; and order satisfaction to be made to him, her, or them, for the damages by him, her, or them, sustained; and for the better recovery thereof, may, in case there be occasion, assign such bond or bonds to the party

Irish stat. sect.
10.

Creditor petitioning to swear to his debt and give bond.

or parties so petitioning, who may sue for the same in his, her, and their name and names; any law, custom, or usage, to the contrary notwithstanding. (23)

(23) We come now to a most important section; if the history of the commission of bankrupt, and if the petition of a creditor had been correctly traced and duly considered, one would have thought, that all the judges would never have given an opinion in the House of Lords in the case of *Degols v. Ward*, that by the *old statutes* it was not necessary that there should be a petitioning creditor's debt prior to the act of bankruptcy.

Lord Talbot, upon a bill filed by the creditors to set aside several conveyances of the bankrupt, as having been made after an act of bankruptcy, dismissed the bill, because it appeared, after much deliberation, that an act of bankruptcy had been committed prior to the petitioning creditor's debt, and therefore he held all the proceedings under the commission were void. The act of bankruptcy was in 1726, and the petitioning creditor's debt contracted in July, 1730.

Upon an appeal from this decree to the house of lords, a question was put to the judges, whether the commission of bankrupt, issued on the 20th of November, 1730, against John Ward, on the petition of George Surties, was good and valid in law?

The judges having had several days to consider of this question, and having had two meetings upon it, all of them attended, on the 23d of February, 1737, in the House of Lords, and being agreed in opinion, the Lord Chief Justice Lee said, that as the commission issued *when the old statutes relating to bankrupts were in force*, they had considered it upon the foot of those old statutes, and that they were all of opinion, that *George Surties being a creditor at the time the commission issued*, therefore the commission is good and valid in law.

Upon which the decree of dismission was reversed, and the court of Chancery ordered to proceed to hear the cause upon the merits. *Degols v. Ward, Forrester*, 243. 4 *Brown's Parl. Ca.* 327. *Cooke*, 23. See p. 205, post.

In this 23d section there is not one word to shew that the petitioning creditor's debt must precede the commission. When Lord Talbot decided that a creditor could not sue out a commission, if there was a pre-existing act

24. And whereas commission of bankrupts are frequently taken out by persons, who, by means of such commissions

of bankruptcy, he also must have formed his judgment from a consideration of the old statutes, for there is nothing in this section, which could possibly have led him to such a conclusion.

All the prior statutes still remain, and will ever remain in force, except as far as they are expressly repealed by subsequent statutes, or become partially repealed by the qualifications or alterations introduced by them.

This section only alters the amount of the creditor's debt, which before was indefinite.

The petitioning creditor was never mentioned in any statute after the 13 *Eliz.* c. 7. s. 2. till the 5 *Ann.* c. 22. s. 7. which is almost *verbatim* the same as the present section.

But the petitioning creditor was introduced by the statute prior to that, viz. by the 34 and 35 *Hen. VIII.* the first bankrupt statute, which is no longer in force, but which will still be available in the construction of the subsequent statutes.

In the first section, after stating *that divers persons craftily obtain great substance of other men's goods, do suddenly flee to parts unknown, or keep their houses, not minding to pay their creditors their debts, &c.*

It then enacts upon every complaint made to them, in writing by any parties grieved concerning the premises, the lord chancellor and other great officers of state, should dispose of the bankrupt's property, &c.

Now here is clearly required a petition from a creditor, who was grieved by the subsequent act of bankruptcy.

The next statute, 13 *Eliz.* c. 7. which in fact repealed the former statute, by confining all bankruptcy to traders, after specifying the acts by which a trader becomes a bankrupt, in the second section enacts, that the lord chancellor, upon every complaint made to him in writing against any such person being bankrupt as is before defined, shall appoint wise and discreet persons by his commission, who shall take order of the bankrupt's property for the payment of the said creditors; the said creditors are those, who before are mentioned as the persons whom the trader intended to defraud by his act of bankruptcy.

The statute is quite clear that no creditor could receive

(on a composition proposed by the bankrupts) and on promise not to execute the same, prevail with and extort from

satisfaction under the commission, who was not a creditor when the act of bankruptcy was committed.

The description of the petitioning creditor is not here so full as in the former statute; but it will not admit, I think, of any doubt, that it meant that the *complaint in writing* was to be made as in the former statute, by *a party grieved concerning the premises*, that is, by one, whose money or goods the trader had obtained before the act of bankruptcy, and one who could receive satisfaction under the commission.

If the opinion of the judges in the House of Lords, and the judgment of that house had been good law, it ought to have continued to have been respected as such, from the year 1737 till the year 1806. For till that year there is not a single word in any act of parliament, which has made any alteration respecting the priority of the petitioning creditor's debt and the act of bankruptcy.

But by 46 Geo. 3. c. 135, s. 5. it was enacted that no commission of bankrupt shall be avoided by any act of bankruptcy, prior to the debt of the petitioning creditor, of which he had no notice at the time of suing out the commission.

Where the petitioning creditor has such notice, that statute has no operation, and the law still prevails as it was before the statute. The case of *De Gols v. Ward*, has many a day perplexed me when a student, as I was not then so presumptuous as to conclude that the eleven judges could have fallen into such an error.

It is said that the opinion was given by Chief Justice Lee, 23d February, 1737, *Cooke*, 22; but that must be a mistake, as Lord Hardwicke was chief justice of the King's Bench till the Easter term in that year, 2 *Str.* 1071.

Having given what I conceive to be the true construction of the 13 *Eliz.* c. 7, s. 2, viz. that the petition to the chancellor for a commission, must have been made by a creditor, to whom a debt was due at the time of the act of bankruptcy, I shall briefly state how the subject has been considered by the chancellors and judges both before and since the extraordinary case of *De Gols v. Ward*.

What the lord keeper (Jefferies) has said upon this subject is so clear and satisfactory, that I shall repeat the whole.

bankrupts their whole debts, or much greater part thereof than such bankrupts pay to their creditors, or otherwise,

Lord Keeper.—"I hold that the commission is *de jure*; and the statute which saith the chancellor may grant, &c. is as if it had been, shall grant or ought to grant; but he cannot grant *ex officio*, but on request of persons interested. If twenty men swear before me, that J. S. is a bankrupt, yet without petition of a creditor, I may not award a commission; but when it is once granted, if the persons that petition, were well satisfied, I do think a *supersedeas* may be granted, as well within four months as after. Possibly they who petition find that it is best for them to have it superseded, for if their debts be by judgment, they will be preferred before others; whereas on the commission they must come in but in proportion with others." *Alderman Backwall's case*, 2 Ch. Ca. 191, 1687.

In this case the chancellor says, there must be the request of persons interested, and the petition of a creditor; but as no creditor had an interest in the commission, whose debt did not exist at the time of the act of bankruptcy, it follows that the chancellor must have meant that the petitioner's debt must have then existed.

What Lord Keeper Jefferies has said, has proceeded from a due consideration and just conception of the subject. But I cannot pay the same compliment to Ch. Justice Treby, who ruled at nisi prius, after argument of counsel on both sides, that, in an action of trover by the assignees, it is not necessary to prove, that the person, upon the petition of whom the commission of bankruptcy was granted, was a creditor of the bankrupt; because upon a view of the statutes, they do not require that. *Smith v. Blackham*, 1 Lord Ray. 724. 10 Wm. 3.

And what Ch. J. Holt ruled at the Thetford assizes, two years afterwards, is still more erroneous; "there is no need to produce at the trial the petition made to the lord chancellor, because it may have been by *parol*, though the practice hath been otherwise." *Kirney v. Smith*, 1 Lord Ray. 741.

Surely the practice was more correct than Lord Holt's opinion, for the statute, 13 Eliz. c. 7, s. 2, says expressly the complaint shall be in writing. It is a great misfortune that such erroneous dicta should be preserved by such authority.

Before the 5 Ann. c. 22, which first required the debt of

get from such bankrupts goods, or other real or personal security, which is contrary to the true intent and meaning

one petitioner to be 100*l.* and of two 150*l.* &c. as in this statute, a practice had prevailed, that the petitioning creditor made an affidavit that the bankrupt was indebted to him and other creditors to the amount of 100*l.*

Serjeant Goodinge, p. 2, who wrote some years before the statute of Queen *Anne*, gives the following precedent, the title of which is, "Affidavit to be made before a master in chancery, before the suing out a commission of bankrupt."

"A. B. of, &c. maketh oath, that R. B. of the city of London, merchant, is truly and justly indebted to this deponent (and others his creditors) in the sum of 100*l.* and upwards; and that he is become a bankrupt within the true meaning of one or some of the statutes made against bankrupts, as this deponent believeth."

This affidavit must have originated in a general order of the chancellor; the object of it with respect to the amount of the debt, was no doubt to prevent frivolous commissions. At what time that limit was fixed upon, I cannot say or conjecture; the party's oath, that he believeth the trader had become a bankrupt was probably coeval with the commission, and was required by the first chancellor to whom a *complaint in writing* was made.

It rests only upon the order or discretion of the chancellor to this day.

The first express authority that the debt of the petitioner should be prior to the act of bankruptcy, is that of Lord Raymond, at the sittings at Westminster.

In *trover*, by the assignees, under a commission against Albertus Barnaby, it appeared he was a bankrupt in January, 1724, and the debt of the petitioner was a note dated in September, 1724.

"And the chief justice was of opinion, it was a void commission, the acts of a man after an act of bankruptcy being void. So the plaintiffs were nonsuit." *Toms v. Mytton*, 2 *Str.* 744. 13 *Geo.* 1.

Lord Hardwicke afterwards held the same at Guildhall.

In this case it was ruled as in *Toms v. Mytton*, that if the debt of the petitioning creditor appeared to be contracted after the act of bankruptcy, it could be no ground for a commission, but where A. had 100*l.* owing on simple contract before an act of bankruptcy, and one is afterwards secretly committed, and then a bond taken; it shall not so

of these several statutes made concerning bankrupts, which Irish stat. sect. 11. said statutes intend that all such bankrupts creditors shall be

far extinguish the simple contract, as to deprive the creditor of petitioning for a commission. *Ambrose v. Clendon*, 2 Str. 1042. 9 Geo. 2.

Lord Chancellor Talbot had held the same, in the clearest language, two years before. The Lord Chancellor declared, "It was clear that nobody but a creditor could take out a commission of bankruptcy against another; for, that the acts of parliament were all made for the relief of creditors; and likewise that such commission must issue on the petition of some creditor who could be relieved under it. When the matter is minutely entered into, it must be distinguished which creditors are precedent, and which are subsequent to the act of bankruptcy." *De Gols v. Ward*, Cas. Talbot, 243. 1734.

All these authorities were overturned by the opinion of the judges in this case, in the House of Lords, 23d February, 1737. Lord Hardwicke was then chief justice of the King's Bench, and as a peer of parliament, it is probable that he voted for the reversal of Lord Talbot's decree conformably to the unanimous opinion of the judges.

Let us now see how this case has been acted upon by the chancellors and judges since.

In a case soon after, Lord Hardwicke was chancellor, it appeared that the petitioning creditor's debt was 94l. due in his own right, and 6l. 6s. upon a note of hand due, also before the act of bankruptcy, but indorsed to the petitioning creditor after the act of bankruptcy, but before the commission was sued out.

It was argued this was not a sufficient debt. Lord Chancellor. The judges, in the case of *De Gols* and *Ward*, were of opinion, upon the foot of the *old acts*, that it was sufficient if the debt were due at the time the commission issued; but had the case been on the *new act*, the judges would have been of another opinion; the new act discharging bankrupts from all the debts they owed at the time they became bankrupt." *Ex parte Wainman*, 21st of October, 1738.

This is the decision of Lord Hardwicke, given by Mr. Cooke, 23, from a MS. as it is not to be found in any other book.

The reasons for the opinion of the judges given by Mr. Cooke, in page 22, he must have copied from this case, as no reasons are given in 4 *Bro. Parl. Ca.* 327.

on an equal foot, and not one preferred before another, or paid more than another in respect of his or her debt; be it

This apology or reason given by Lord Hardwicke for the opinion of the judges, is not very satisfactory, for I trust I have sufficiently proved before, that the proposition that the debt of the petitioner must precede the act of bankruptcy, depends upon the 13 *Eliz.* c. 7. s. 2, and there is not one word to alter it in the subsequent statutes. Besides, there was no reason to consider it upon the foot of the old statutes alone, for the 5 *Geo.* 2. c. 30, had its operation from the 14th of May, 1729, the time of the expiration of the 5 *Geo.* 1. See Sect. 1.

Mr. Taunton, in a note to the *King v. Bullock*, has justly observed, "There is some difficulty in understanding the reason assigned by the reporter." 1 *Taunt.* 77. The reason assigned in my opinion is incomprehensible, because the whole, I am convinced, is founded on a most extraordinary misconception of the subject.

Lord Kenyon seems to have forgotten the *old acts*, and would have decided, if it had been necessary, that if a debt existed at the time of the petition, it would have been sufficient. Lord Kenyon, Ch. J. "All that the act of parliament requires is, that there should be an existing debt of 100l. in the petitioning creditor; this petitioning creditor had such a debt at the time of petitioning, and that is sufficient to support the commission.

The act of parliament only says, that no commission shall be taken out, unless the debt of the creditor petitioning for the same do amount to the sum of 100l. Then when is that debt to exist at the time of the petitioning." *Glaister v. Hewer*, 7 *T. R.* 498.

But surely this is far too general, and is never true but in that particular case, namely, where a debt by a promissory note or bill of exchange existed before the act of bankruptcy, and is indorsed to the petitioning creditor afterwards. This is a debt which may be proved under the commission, and which the bankrupt owes before he becomes a bankrupt.

This had been settled long before by Lord Hardwicke, "The bankrupt petitioned to supersede the commission against him; because the petitioning creditor's debt arose only from a note that had been indorsed to him, after the petitioner had committed an act of bankruptcy; but as it

therefore enacted by the authority aforesaid, That if any bankrupt or bankrupts shall, after issuing of any com-

appeared that the note itself was given before any act of bankruptcy, though indorsed after, Lord Chancellor thought it a debt upon which the petitioning creditors might take out the commission. *Ex parte Thomas*, 1 *Atk.* 73. 1747.

This is to the same effect as *Ex parte Wainman*, and they are both pregnant with the conclusion, in opposition to the opinion of the judges, that a petitioner's debt must exist before the act of bankruptcy. *S. P. Aron*. 1 *Wils.* 135. 1761.

But long before the 46 *Geo.* 3. a practice had prevailed that a commission would not be superseded, or was not void, on account of an act of bankruptcy prior to the petitioning creditor's debt, provided there was one subsequent, unless there was also a debt or debts existing at the time of the former act, upon which a commission might be sued out with a reference to that prior act of bankruptcy. When the practice originated, I am not able to say, but I find it mentioned as a prevailing practice in *Bullock's case*, and it is first mentioned in 2 *Esp. Cases*, 595. *Doe v. Boulcot*, and others, *C. P.* 38 *Geo.* 3. This was an action of ejectment, by assignees, to recover the possession of premises claimed as the property of the bankrupt.

"In going into the title under the bankruptcy, the defendants relied upon an act of bankruptcy committed early in the month of December, 1796; the petitioning creditor's debt accrued in the month of August and September in the same year. The counsel for the plaintiffs then proceeded to give evidence of an act of bankruptcy in the April preceding, and proved an absconding from his dwelling house at that time: and then relied that this having preceded the petitioning creditor's debt, the commission could not be supported. For the defendants it was contended, that the mere proving of an act of bankruptcy preceding the petitioning creditor's debt, before which the present commission was founded, would not be sufficient, unless they proved that at the time there were debts due by Hunter, upon which a commission could be sued out. *Le Blanc*, Serjt. as an *amicus curiæ*, mentioned that this point had been so decided in the court of King's Bench, on a motion for a new trial from

mission against him, her, or them, pay to the person or persons who sued out the same, or otherwise give or deliver

the Norfolk circuit, where the judge having ruled the evidence of the act of bankruptcy only was sufficient, without proving a petitioning creditor's debt subsisting at the time of the act of bankruptcy committed, the court granted a new trial: as otherwise a trader might defeat every commission sued out against him. Eyre, C. J. said, this was perfectly new law to him; and if it was law, numberless determinations in the books, which have been held to be law, must now be held otherwise. If the court of King's Bench had held that to be law, he should hold himself bound by it; but it could not affect the present case, as from the evidence produced by the defendant, there appeared to be a petitioning creditor's debt in being, at the time the first act of bankruptcy was committed. The plaintiff had a verdict."

"This point was expressly ruled so also by Lord Kenyon in the case of *Packer v. Manning*, at Guildhall, 38 Geo. 3." Ibid. 597, note.

It was founded in reason, otherwise if a trader had committed an act of bankruptcy when he had no debts, or discharged all which could support a commission, he would be privileged, if he wished it, all his life from bankruptcy.

But this, since the 46 Geo. 3, is only material when the petitioning creditor has knowledge of an act of bankruptcy prior to his debt; then it will or will not vacate his commission, just as there are or are not sufficient debts to support a commission upon that prior act of bankruptcy.

If a commission before the 46 Geo. 3, was void upon proof of an act of bankruptcy prior to the petitioning creditor's debt, and upon proof also of a sufficient debt existing at the time of the act of bankruptcy; it must have been void also upon the same principles of law, or the same construction of the statute, immediately after the passing of the 13 Eliz. except only so far as these modern statutes have fixed a limit to the petitioning creditor's debt.

But I am inclined to think that the necessity of proving a prior debt as well as a prior act of bankruptcy never occurred to any chancellor or judge till the case from the Norfolk circuit referred to in *Doe v. Bowcot*. As the case is not reported I presume it came before the court of King's

to such person or persons goods, or any other satisfaction or security for his, her or their debt, whereby such person

Bench previously to the commencement of the Term Reports.

When *Toms v. Mytton*, 2 Str, 734, ante p. 206, was cited in Bullock's case, Lord Ellenborough observed, "it does not in that case appear but that a previous debt was proved upon which a commission might issue, and that this is included in the reporter's expression that "*he was a bankrupt*."

But if such a proof had existed, or the necessity of it had occurred to the mind of any judge, before the case from the Norfolk circuit, it would certainly have been noticed in some prior case, especially in the great discussion whether there must not be a pre-existing debt to every act of bankruptcy upon which a commission is founded.

Lord Eldon, in Bullock's case, is reported to have said "we know that a prior act of bankruptcy, set up in a court of law, will not now avail, unless a petitioning creditor's debt be shewn to exist prior to the act of bankruptcy. But it is not required to be shewn that the creditor ever meant to take out a commission upon that debt; the law at present is somewhat anomalous in this respect." 1 Taunt. 88.

In an action by the assignees to recover a debt due to the bankrupt, the defendant proved an act of bankruptcy prior to the petitioning creditor's debt, and also a sufficient creditor's debt at the time; the plaintiffs proved, in answer to that defence, that the creditor had petitioned to supersede a prior commission, and had proved his debt under the existing commission; but Sir James Mansfield and the court of Common Pleas held, that the acquiescence of the creditor made no difference, and that the second commission was absolutely void when it was sued out. *Beardmore v. Shaw*, 1 N. R. 263. E. 45 Geo. 3.

Such a defence will still be good since the 46 Geo. 3. c. 135, if the defendant can also prove that the petitioning creditor had knowledge of the prior act of bankruptcy, or that the bankrupt was insolvent or had stopped payment.

The law upon this subject may certainly be considered a modern discovery, and it does not seem yet to be brought to perfection.

Three questions seem to arise whether it need be proved only that the debt existed when the act of bankruptcy

or persons, suing out such commission, shall privately have and receive more in the pound, in respect of his, her, or

was committed ; or whether it must be proved that it existed then, and also when the commission was taken out ; or whether it must be proved that it existed and remained undischarged when the objection is made.

The sense and reason seem to be that the existing commission shall not be disturbed, when there can be no different distribution under any other commission.

When the debts existing before the first act of bankruptcy have been discharged before the second act of bankruptcy, if the commission founded on the second act of bankruptcy could be vacated by the mere proof of the prior act, and the existence at the time of such a debt, it would exactly free the trader from all bankruptcy as if he had committed an act of bankruptcy without any debt existing at the time.

But what Sir James Mansfield and the court of Common Pleas has said in the last-mentioned case, though not material to the point in question, will probably be considered the law in future.

“ At the same time it may be observed, that if this had been the only subsisting debt under the old act of bankruptcy, and this debt had been paid or released before the trial, the commission might have been supported, and so the commission might have been made good by an act subsequent to the time of its being issued, though it were bad at the time it was taken out.” *Beardmore v. Shaw*, 1 N. R. 266.

Lord Ellenborough has expressed the same opinion in *Miles v. Rawlins*, 4 Esp. N. P. 194.

The sufficient debt of course must be 100*l.* to one creditor, 150*l.* to two, or the whole amount of his debts 200*l.*

This case happens not unfrequently in practice ; the witness to prove the act of bankruptcy is prepared to prove several acts, some prior and some subsequent to the petitioner's debt. I have had great doubts how the commissioners ought to act ; but as an act of bankruptcy alone without a prior existing debt is not sufficient to avoid a commission, I have thought the commissioners justified in stating the act of bankruptcy subsequent to the petitioner's debt, only upon the proceedings, and to proceed in the commission, as they have no evidence to shew that the proceedings under the commission either will or can be disturbed.

their debt, than the other creditors, such payment of money, delivery of goods, or giving greater or other security or

The court of King's Bench have decided that neither the bankrupt, nor any person claiming from him by assignment subsequent to the commission of bankrupt, shall be permitted, in an action at law, to question the validity of such commission, and recover from the assignees the property of the bankrupt taken under it, by proving an act of bankruptcy committed by the bankrupt prior to the petitioning creditor's debt; though it be also shewn that there was a sufficient petitioning creditor's debt existing at the time of such prior act of bankruptcy, whereon a better commission might have been sued out. *Donovan v. Duff*, 9 East. 21.

Before the 5 Ann. c. 22. s. 7, first introduced these limits to the petitioning creditor's debt, the chancellor by his discretion had ordered that the petitioning creditor should make an affidavit that the debts of the bankrupt amounted to 100*l.* see p. 206 ante. And it has been decided by the court of Common Pleas that that part of the section, which requires an affidavit to be made, does not constitute a condition, and that the commission to comply with it does not make the omission void, though it may afford a ground of application to the chancellor, either to set aside the commission, or to stay proceedings till proper affidavits be made.

The case was an action by the assignees for money due to the bankrupt; the plaintiffs proved the petitioner's debt, being four of them, to the amount of 200*l.*; the defendant, to defeat the action, produced the affidavit of the petitioners sworn before a master in chancery, previous to the issuing the commission, in which they had sworn only to the amount of 199*l.*

But it was held not to be material, that this affidavit was only directory and not conditional; it is never produced before the commissioners, *Hill v. Heale*, 2 N. R. 196. 46 Geo. 3.

But the limit in the first part is conditional, and must be strictly complied with; no commission shall be awarded unless the single debt of the creditor petitioning shall amount to one hundred pounds, &c. or unless the debt of three creditors so petitioning shall amount to two hundred pounds.

A case has occurred where the debt of three petitioning creditors did not amount to 200*l.* yet the debt due to one

satisfaction, shall be deemed and taken to be such an act of bankruptcy, whereby, on good proof thereof, such com-

was more than one hundred pounds. The court of King's Bench gave no opinion: *Smith v. Milles*, 1 T. R. 475.

The statute is clear and peremptory; if three will join in the petition, their debts must amount to 200l. if not, the commission is void.

The creditor whose debt amounts to 100l. may alone sue out a commission, but he cannot be compelled; and if he calls in the aid of others, in my opinion it is clear that he must comply with the statute.

The petitioning creditor when he makes an affidavit of his debt, must also add to it, that the party has become a bankrupt as the deponent believes. See page 206 ante.

That part of the affidavit is not required by this or any statute, but must have originated from an order of the great seal as a measure of caution.

Lord Eldon has observed upon this part of the affidavit: "I thought that in fact, the legislature had not required an affidavit by the person striking the docket, to his belief, that the party had at that time committed an act of bankruptcy.

That practice, at what time introduced I know not, perhaps is wise in general; and it appears to me, that when the form of the affidavit was settled, that the deponent should state only, that he *believes* the party a bankrupt, at that time attention was given to this section of the act of parliament." *Wydown's case*, 14 Vez. 88. I have stated before, p. 206, that the form of the affidavit was given by Serjeant Goodinge, previously to the 4 and 5 Ann, the first of the new statutes.

In an action of trover by assignees, the act of bankruptcy proved was lying in prison two months, but it appeared the commission was dated before the end of the two months, upon which Mr. J. Rooke directed the plaintiff to be nonsuited. Upon a motion to set aside the nonsuit, Lord Kenyon said, "I cannot conceive how a commission of bankrupt can be taken out in such a case before the two months are expired; because, in order to obtain it, there must be an affidavit made that the party *has committed an act of bankruptcy*."

"The act itself is not completed till the expiration of the two months, by the very words of the act of parliament. The commission therefore cannot regularly issue until that time; and the Lord Chancellor, if the fact were dis-

mission shall and may be superseded; and it shall be law-^{and another}
ful for the lord chancellor, lord keeper, or commissioners ^{granted.}

closed to him, would most probably supersede the commission, *which can only be founded on perjury*. If such a practice has prevailed, it is fit that a stop should be put to it as soon as possible. The rule refused." *Gordon v. Wilkinson*, 8 T. R. 507.

Lord Kenyon did not, at the time of making this decision, appear to be aware that this part of the petitioning creditor's affidavit was not required by any act of parliament whatever, and therefore it ought not to have been the foundation of any judgment, in a court of law. Besides, the deponent swears only to his belief, and surely in many cases after a trader has been confined in gaol for debt for a length of time, a person may honestly and conscientiously swear that he *believes* the trader will neither pay the debt, nor procure bail before the expiration of two months, which is precisely the same thing as that he *believes* he has then become a bankrupt. Lord Kenyon's alarm respecting the crime of perjury seems to have been altogether groundless.

The commissioners cannot find the party a bankrupt till the end of the two months. But by suing out the commission previously, great delay may frequently be prevented, and where, if the delay exist, there might be great waste and spoliation of the bankrupt's estate. As if the bankrupt was in Newcastle or Carlisle gaol, and the chancellor also at a distance from the metropolis; and if no step could be taken to forward the commission till the expiration of the two months, a fortnight more would probably elapse before the party could be declared a bankrupt.

It has moreover been decided that a commitment of a trader to gaol for debt raises such a presumption that the act of bankruptcy will be completed, that it is considered as certain knowledge of an act of bankruptcy, and every person who deals with him in any way whatever, respecting his property, deals with him as a known bankrupt, and the transaction is null and void; as if he receives money from the bankrupt, he must repay it to the assignees, and if he pays to the bankrupt, he must pay to them again, &c. *King v. Leith*, 2 T. R. 141.

It is stated in Beawe's Lex Merc. 531. that in *Pope v. Gill* at nisi prius at Guildhall, M. 5 Geo. 2. Lord Raymond

for the custody of the great seal of *Great Britain*, for the time being, to award to any creditor or creditors peti-

thought such a commission valid, which proves that the practice was very antient.

From these considerations, and especially because Lord Kenyon's judgment is founded upon an erroneous conception of the affidavit, I am inclined to think if the case was reconsidered, the result would be different. The chancellor's opinion might be correctly taken, if such an affidavit were made, and all the circumstances communicated to him before the commission was sealed.

A verdict was obtained for damages in an action for a breach of promise of marriage, the defendant committed an act of bankruptcy, and the plaintiff, as petitioning creditor, sued out a commission of bankruptcy before the judgment was signed, his debt being only the damages recovered by the verdict.

Lord Eldon superseded the commission, conformably to what he had held in *Ex parte Hill*. See p. 166 *ante*. *Ex parte Charles*, 15 *Ves.* 256.

That decision was confirmed by the court of King's Bench in Hilary Term, 1811.

It is therefore now fully established, as in a preceding page I predicted it would be, that a debt arising upon a verdict only, for a tort, cannot be proved under a commission which issues before judgment.

The petitioning creditor had a note for one hundred pounds drawn by the bankrupt, indorsed to him by the holder, but which he bought for 10s. in the pound. This debt being objected to, Lord Chancellor Macclesfield observed, "though the petitioner for this commission has thus gained the notes given by the bankrupt, yet he is plainly a creditor, just as if the persons to whom the bankrupt before his bankruptcy gave these notes, had paid an under-rate for them; nay though they had been given without any consideration, yet they are now become his debts, and the legal right thereto vested in the indorsee." *Ex parte Lee*, 1 *P. Wms.* 782.

I do not find that this case has ever been animadverted upon by any succeeding chancellor or by any court of law.

But that it is true to a very limited extent, I think will appear from the following case, which occurred within my own experience.

tioning another commission ; and such person or persons so taking or receiving such goods, or other satisfaction, as

My colleagues and myself were desired to open a commission ; when it was stated that the petitioning creditor's debt was a promissory note for 100l. We inquired what was the consideration, and we were told that the holder purchased it for 20l. We refused to proceed, unless the holder would bring the indorser or the payee, who could swear he had given *bona fide* 100l. for it.

We never heard any more of it. Though I have only my own authority to cite against Lord Macclesfield ; but surely *Ex parte Lee* can only be law where the seller of the note had a right to prove for a valuable consideration a debt of 100l. otherwise a petitioning creditor's debt may be created by the payment only of one hundred pence.

Besides, it would be directly contrary to the 21 Jac. c. 19. s. 9, which directs that there shall be no relief upon any judgment, bond, &c. for more than the just debt, without any regard for the penalty or greater sum contained in the security.

But it appears to be decided that the holder of such a note or bill given merely for accommodation may prove the whole amount against the drawer and acceptor, provided that he does not receive more than 20s. in the pound or the amount of his debt. The first decisions upon the subject were made by Lord Thurlow in *Ex parte King*, 10th Nov. 1786. *Cooke* ; and *Ex parte Crossley*, 3 Bro. 237.

They seem to have been confirmed, by Lord Eldon in *Ex parte Bloxham*, 5 Ves. 448. 6 Ves. 449 and 600. ; but with some hesitation.

Whilst a note or bill is merely accommodation it cannot be proved under any commission ; but when a holder has given full value then it may be proved for the whole amount under the commissions of each party.

But whilst it is merely accommodation, if the holder indorses it for a part only of its value, it appears from these cases the whole may be proved, but the creditor must not receive more than the amount of his debt ; but this is surely repugnant to the principle established by the 21 Jac. c. 19. s. 9, which seems to be that by no security or instrument the creditor shall prove more than either the bankrupt has received or the creditor has paid. It seems extraordinary that that should be done by the indorsement of a note, which cannot be done by a *judgment, bond, or the note itself*.

said commissioners, acting under such new commission, shall appoint, in trust for and to be divided amongst the

the bankrupt is indebted to him in so much, upon a judgment for debt and costs, for which he has received no satisfaction, except by the execution of a writ of *capias ad satisfaciendum*, by which the bankrupt was arrested before the suing out of the commission, and still remains in custody.

Upon such a proof the bankrupt is set at liberty now, by the 49 Geo. 3. c. 121. s. 14.

If the arrest in execution was satisfaction, every other creditor ought to insist upon the rejection of such a proof.

There seems to be a much stronger reason that the petitioning creditor should have the benefit of a commission against his debtor in execution than any other creditor. For when a creditor has used all diligence at a great expence to recover his debt, against a debtor, who may have copyholds, estates-tail, mortgages, debts due to him, money in the funds, &c. in abundance, which cannot be reached by any writ of execution; if he cannot sue out a commission after the debtor has been two months in gaol, the bankrupt may make his peace with the other creditors, and the principal creditor will be remediless.

If *Cohen v. Cunningham* continues to be considered as irrevocable law by the courts, an alteration ought to be made in this instance by the legislature. Where the debtor is a trader, and his person is protected by privilege of parliament, every creditor can either compel him to make satisfaction or to become a bankrupt. See 4 Geo. c. 23. post.

The same ought to be the case of every other creditor and debtor subject to the bankrupt law, which *Cohen v. Cunningham* has unfortunately obstructed.

The 41 Geo. 3. c. 64, gave the creditor a power to discharge his debtor out of custody, and to have afterwards the same remedy against his property. But that excellent statute was but of short duration; if it is ever revived, this defect in the bankrupt law will be supplied.

If the bankrupt after the date of the commission is taken in execution by the creditor, whatever might be his motive for it, it is such a conclusive election, that he shall not be permitted afterwards to resort to the commission. *Esparte Knowell*, 13 Ves. 192.

other of the bankrupt's creditors, in proportion to their respective debts (24). (For this note, vide post.)

When an agent, without the authority or the knowledge of his principal, who was abroad, took the bankrupt in execution after the commission was sued out, it was held an unalterable election. *Ex parte Warder, Cooke, 132.*

But I should think it would not be held an election, if the creditor would make a positive affidavit that the bankrupt was arrested before he had knowledge of the commission, and that he proved his debt or offered the proof of it at the first meeting afterwards, and then discharged the bankrupt. Under such circumstances it would seem he would have the same equitable claim to prove as a creditor who had him in execution at the suing out of the commission.

A creditor having taken the bankrupt in execution, subsequent to the commission, afterwards released him; and proved his debt, the proof was ordered to be expunged. *Ex parte Bisson, 23 March, 1792, Cooke, 133.* I should think the creditor would not be concluded till he had actual knowledge of the commission, for till then he cannot be said to have made an election. But in every case the proof of the debt ought to be made, before the bankrupt is released.

If the bankrupt voluntarily surrenders himself in discharge of his bail, or if they surrender him, the creditor is not affected until he actually charges him in execution. *Ex parte Cundall, 6 Ves. 446, 1801.*

If the bankrupt is in execution at the suit of a creditor at the issuing of the commission, the creditor need not make his election till there is a dividend. *Ex parte Warwick, 14 Ves. 138.*

But if the bankrupt obtain his certificate before that time, I should think the creditor ought not afterwards to be permitted to prove; the debt is then fully discharged, and it was his own fault not to make his election sooner.

It was lately decided by Lord Chancellor Eldon, that a creditor cannot petition for a commission, or prove his debt under a commission, if the debt is of such a standing as the statute of limitations might have been pleaded in bar to an action brought by the creditor against the bankrupt, before the date of the commission. *Ex parte Dewdney, 15 Ves. 498.*

It had always been the practice of the list of com-

The charge of
the commissioners to be
paid by the
assignees.

25. And be it further enacted by the authority aforesaid,
That the creditors or creditor who shall petition for, and

missioners of which I am one, to admit the proof of such a debt, if it was sworn by the creditor, that it was a just debt, and had never been paid, and if the bankrupt also admitted upon his oath, that he had *bona fide* contracted the debt, and had never paid it.

The following observations in support of the practice were drawn up before the writer of them had any opportunity of knowing what arguments had been advanced by the counsel, or what reasons had been given by the court, in the decision of this case. His reasons are therefore neither borrowed, nor dictated by a spirit of opposition to the authority of the court.

This question must be determined upon the true construction of the statutes of bankrupt, and also of the statute of limitations, 21 Jac. c. 16.

I will first consider the reason for ascertaining the intention of the legislature, and then consider how far this question had been settled by judicial decisions.

The statute of limitations was founded upon principles of sound policy, which sometimes permits a degree of injustice, in order to prevent a much greater degree of it. The object of it was to give an honest man a ready defence against the claims of dishonesty, when a debt was demanded, which never had existence, or which had been discharged, but demanded again at a time when the witnesses were dead, or the receipts and vouchers were lost. This statute was founded upon the same principle, as that which was afterwards entitled, "an act to prevent frauds and perjuries." 29 Car. 2. c. 3. And it might with great propriety have borne the same title; but the defendant is equally guilty of the same moral wickedness, and villainy, as that which the statute was intended to prevent, if he pleads this statute, when he is conscious, he has never paid a just debt.

If a kind creditor has lent a friend a sum of money, in his indigence, and has had the delicacy never to remind him of it, because he thought it was inconvenient to him to repay it, and if he should ask for it, when his circumstances have become affluent, the debtor may have the baseness and ingratitude to tell his creditor, in effect I shall never pay you either principal or interest, because it is now ~~six~~ years since the debt was contracted.

obtain any commission of bankrupt, shall be and is and are hereby obliged, at his, her, or their own costs and expences,

This certainly the statute permits, but God forbid that it should recommend. The statute was intended as a shield to protect, not a weapon to defend--*Scuto magis quam gladio opus est.* Liv.

This statute of limitations was one of the greatest innovations upon the common law; and though it may be considered a remedial statute, and therefore admits of a liberal construction, as far as it relieves against fraud, yet it ought to have the strictest construction put upon it, as far as it introduces fraud and injustice.

The statute does not extinguish a real existing debt, but only gives an honest defendant, a certain and ready means of defence against a claim unfounded *in truth and reality*. Hence a promise to pay a debt, where the action is barred by the statute, is binding as supported by a legal consideration; and the courts have gone so far as to decide that the bare admission of the existence of it is equivalent to such a promise, and that the action may be sustained within six years from such an admission. And saying any thing which is not a positive denial, is considered an admission. *Baillie v. Sibbald*, 15 Ves. 185.

The construction that an admission, that the debt is still owing was equivalent to a fresh assumpsit, and took the case out of the statute, was a refinement founded upon an honest zeal to restrain, to a certain extent, the injurious and mischievous effects introduced by the statute. But this is far too long established now to be shaken.

The statute of limitations uses the words *actions* only, viz. "all actions of debt grounded upon any lending or contract without specialty, shall be brought within six years and not after." The question then is, whether this word *action* precludes a creditor from having any benefit under a commission of bankrupt, from a lending or contract without specialty, which is of more than six years duration.

A commission of bankrupt has sometimes been called a statute execution, which I have always considered a puerile simile, in which there was little similarity, and from which no sensible or legal conclusion has ever been drawn. The whole proceeding in bankruptcy is founded upon statutes, that is, upon the express will and intention of the legislature; or where it is not fully expressed, upon that will and intention which we collect from those rules,

to sue forth and prosecute the same, until an assignee or assignees shall be chosen of such bankrupt's estate and

universally established by the common law, or in the remotest times for the interpretation of statutes.

We have different rules for the interpretation of penal statutes, and of those statutes which do not punish, but are promotive of retribution or civil justice.

The two first statutes had called the bankrupt an offender, and therefore they might be considered penal statutes; the third, a statute passed in the 21 Jac. c. 19, in the very first section, for that reason "enacts that all and singular the statutes and laws heretofore made against bankrupts, and for relief of creditors, shall be in all things largely and beneficially construed and expounded for the aid, help, and relief of the creditors of the bankrupt."

It is in this case worthy of consideration, that this most important statute in bankruptcy, was passed in the same sessions of parliament with the statute of limitations; one is chapter 16, and the other chapter 19; they were probably composed by the same author or authors; and at that time Sir Edward Coke, who had been chief justice of England, was an active member of the house of commons, in which house they originated. But the question is, whether the word *action* in the statute of limitations includes a commission of bankrupt, and whether that word which does not deprive a creditor of all chance of benefit from a trader's estate in the statute, in which it is used, shall exclude him from every possibility of having a share of it under the statutes of bankruptcy. Surely if this had been the intention of the legislature, they would have expressed it more clearly in one statute or the other, either in chapter 16 or in chapter 19.

But if no statute of bankruptcy had been passed that year, I should have thought the word *action* could never have been extended to include a commission of bankrupt; and if it admits a reasonable doubt, ought we not to resolve and remove that doubt, by the rule prescribed in that very year, by the legislature itself, viz. to expound it in all things wisely and beneficially for the aid, help, and relief of the creditors. 21 Jac. c. 19. s. 1.

It may be said, perhaps, that we are still at liberty to construe those statutes to the prejudice of a particular creditor in favour of the creditors in general.

But the legislature, by c. 19, sec. 9, has enacted that all

effects; and the commissioners to be named in any such commission shall, at the same meeting which shall be ap-

creditors having security by specialty with penalties, or other security, or having no security, shall have a rateable part without respect to any such security.—This statute has expressly put all debts upon an equal footing in bankruptcy; and it seems repugnant both to the letter and spirit of it, to say, that if a man has lent a bankrupt money nineteen years ago upon a bond, he shall be admitted to prove his debt; but if another has lent him the same sum, and under the same circumstances precisely, with respect to interest or acknowledgments, except that the loan was seven years ago, and the security a promissory note, or any other simple contract, he shall be utterly excluded.

And there is still another reason to be found in the very same section, why a creditor should be barred by the statute in an action, and not barred from coming under the commission.

The evidence is totally different: in the action neither the creditor nor the debtor can be heard; under the commission, they both may and must be heard.

The words of the ninth section, are—"the commissioners shall and may examine upon oath, or by any other ways and means as to them shall think meet, any person or persons, for the finding out the *truth and certainty* of the several debts due and owing to such creditor as shall seek relief by such course of commission."

This is the statute upon which the practice of admitting the creditor's proof of his own debt is founded. The *truth and certainty* of the debt is all that is required. Every idea of time and of difference of security by this section is excluded. The creditor must first prove, upon oath, how his debt arose, viz. by goods sold and delivered, or money lent and advanced, &c. and whether he has received any satisfaction. The bankrupt must always be examined, when there is any doubt suggested, whether he contracted such a debt, what was the value he received in money or in goods, and whether he ever repaid the debt.

In bankruptcy he must be compelled to admit, or perjure himself, that the debt was still due and unpaid, if that is the *truth and certainty* of the case. The proper examination of a bankrupt, wherever it is requested by a creditor, or thought necessary by the commissioners, is to

pointed for the choice of the assignees, ascertain such costs, and by writing under their hands shall direct and order the

this effect—What was the amount of your capital or property when you began trade, after payment of your then existing debts? what were the annual profits of your trade, if any? what is the amount of your present debts? For these are evidence of so much property received by the bankrupt, losses excepted by accommodation or suretyship; from the sum of these subtract the amount of the existing property, and the difference is the amount of the waste or consumption of property during the time he has been in trade, and the deficiency the bankrupt must account for by expenditure, losses, &c.

If the bankrupt received from A. 1000*l.* in money or goods seven years ago, upon simple contract, he must be compelled to admit it; and he must answer how he disposed of it, either by paying the debt, or if he never paid it, he must account for this as for all other property which has gone through his hands.

The admission then or the denial of the *truth and certainty* of the existence of a debt barred by the statute of limitations in bankruptcy is inevitable.

If the bankrupt should refuse to answer, the commissioners must commit him.

A commission of bankrupt is certainly subject to no limitation with respect to the act of bankruptcy: if that was committed fifty years ago, a commission may now be sued out, if a petitioning creditor's debt was contracted before that time, and still continued an undisputed debt to the present day. Of that there can be no controversy.

The form of the depositions ever since the passing of the statute of limitations to the present time is material.

The time of the commencement of the debt is never specified; it is never presented to the eye of the commissioners, and it is only suggested to their minds by the observation of the assignees or some other creditor, and then they are called upon to inquire into the truth, *certainty and reality* of it, by examining together the creditor and bankrupt, in order to convince themselves of the origin of the debt, and its existence at the present time, or that it never has been repaid.

The 5 Geo. 2. c. 30, requires that the affidavit of the petitioning creditor before a master in chancery shall con-

assignee or assignees of such bankrupt's estate, who is and are hereby required to pay and reimburse such petitioning

tain the *truth and reality* of the debt. No time is there required.

By the 21 Jac. c. 19. s. 9, his subsequent proof, under the commission, must contain the *truth and certainty of his debt*.

The 5 Geo. 2. c. 30. s. 24, also declares, that the *several* statutes made concerning *bankrupts intend* that all such bankrupt's creditors shall be on an equal foot, and not one preferred before another, or paid more than another, in respect of his or her debt.

Specialties and simple contracts are put upon the same equal foot in bankruptcy, by the 21 Jac. c. 19, and by the 5 Geo. 2. c. 30; and specialties are certainly not within the statute of limitations. Is it not fair then to presume, perhaps to conclude, that simple contract debts also are not within the statute of limitations with respect to bankrupts; and that the legislature never considered the statute of limitations as one of the several statutes made concerning bankrupts?

If the debt is entirely extinguished in bankruptcy by the statute, then the commissioners ought to be as careful that such a creditor should have no share of the bankrupt's property as a perfect stranger who never had any dealings with the bankrupt; and if a dividend should be paid to such a creditor, the assignees ought to recover it back, as so much money paid by mistake.

There seems to be another reason why the statute of limitations was not intended to have any operation in bankruptcy. It particularly excepts accounts between merchant and merchant. In *Catling v. Skoulding*, 6 T. R. 189, Lord Kenyon says, "it must be remembered that there the plaintiff is not barred, though there has been no transaction of any kind between the parties for six years: for by his replication he insists that his case never was within the statute, for that the accounts were between merchant and merchant."

There is some doubt upon this subject, whether there must not be one item within six years to take the rest out of the statute. But here Lord Kenyon has declared his opinion that the balance of an account between merchants was not affected by the statute, but might be recovered after any length of time like a debt by specialty.

The reason that merchants accounts were excepted by

creditor or creditors such his, her, or their costs and charges as aforesaid, out of the first monies or effects of the said

the statute probably was, that merchants are more methodical in their accounts, and are more careful in the preservation of their books, vouchers, and evidence of payment, and therefore they did not require the aid of the statute for the protection and security of their payments like other persons out of trade. By this exception the legislature probably thought that the debts of the trader were not barred by the statute, and therefore that it could not have any restraint or operation upon the statutes respecting bankrupts.

If what Lord Kenyon has advanced is law, then the balance between merchants and a specialty debt stands upon an equal foot exactly. And though in bankruptcy both the creditor and debtor may and must be examined, yet what they swear is not conclusive upon the commissioners; but the chancellor might direct an issue in which they might both be examined, in which the presumption of satisfaction, discharge, or release from length of time, would have all the effect that the wise discretion and observation of the judges could give it, and that presumption might be strengthened or weakened by the evidence of one or both parties.

In short, the certainty and reality of a simple contract debt between traders or in bankruptcy would be ascertained by the same rules, or principles, or nearly so, as we now ascertain the validity of a trader's bond.

Lord Loughborough has made an order that the petitioning creditor shall attend the commissioners in person, when they open the commission, and he shall state in his deposition the time or times when his debt accrued. That order had no reference whatever to the present question; but the object of it was, that the validity of the commission might appear upon the proceedings, by having a sufficient debt antecedent to the date of the act of bankruptcy, which is still necessary. But that particularity is not afterwards required in his proof to entitle him to receive a dividend; and under the 46 Geo. 3. c. 135, many creditors may prove under the commission, who could not have been petitioners for it; viz. all whose debts have been contracted between the act of bankruptcy and the date of the commission.

If this had been the law, all depositions of debts ought to have stated the date of their commencement, that if it

bankrupt, that shall be got in and received under the said commission; and every creditor of the said bankrupt shall

were six or twenty years before the date of the act of bankruptcy; and now, since the 46 Geo. 3. c. 135, before the date of the commission that the commissioners might have done their duty by inquiring whether there were any circumstances which rendered them realities or nullities. The absence of such specification of time fully proves the cotemporaneous interpretation of these statutes.

---*Cotemporanea consuetudo optimus interpret est.*

These are the chief reasons which result from the internal evidence of the statutes themselves, why the statute of limitations has no reference to, nor ought to have any operation upon, the statutes respecting bankrupts.

If we have recourse to arguments from inconvenience and hardship, which are properly placed in the scales, when other arguments are upon an equipoise, for we may fairly presume that to be the best law which produces the least degree of hardship and inconvenience, I should think in this case they will preponderate, with the reasons above suggested. If the bankrupt's estate has been purchased by the creditor's money or goods, it is surely hard upon him that he should see all the remains of it divided amongst the other creditors, and he must have no share of it whatsoever, because he cannot prove the bankrupt's admission of the debt within the six years preceding. But if it cannot be proved under the commission, the debt is not discharged by the bankrupt's certificate: and as the bankrupt has been compelled to admit in public upon his oath, that the debt was *bonâ fide* contracted and never paid, it follows, as an inevitable consequence, that when he is stripped of all his property, and has honestly conformed to the bankrupt law, he is still liable to answer this debt in person, and may be immured in a prison, from which he can only be liberated by death, or the humanity of the legislature. Surely these are hardships, which are repugnant to the whole policy of the bankrupt law.

I shall now consider how far this question was decided before this case, by judicial authorities.

The first is only a *nisi prius* authority. *Swayne v. Wallington*, 2 Str. 974, 13 Geo. 1. The plaintiff was an assignee of a bankrupt, and upon proving the petitioning creditor's debt, Chief Justice Eyre held, that a promissory note of twelve years standing was good, saying, that "though six years were passed, he could not presume it to be barred."

Creditors may
prove debts
without paying
contribution.

be at liberty to prove his, her, or their debt or debts under the said commission, without paying any contribution or

The next is an anonymous case in *Mosely*, p. 37, 15 Geo.

1. It was a petition by the *bankrupt* himself to supersede the commission, because some of the debts of the creditors to make up 200l. were barred by the statute of limitations.

The case is not very intelligible, because the chancellor proposes that there should be an issue, and that the bankrupt should have the benefit of the statute of limitations.

The counsel for the creditors wisely decline it, as that would leave them as it seems nothing to try. The case then states, that the lord chancellor superseded the commission, "because the statute would be eluded, if the creditors who suffered it to run upon their demands, should be allowed to take out a commission."

Perhaps a less satisfactory reason could not possibly have been given by any court. It certainly would be eluded, in the case of all traders, who had become bankrupts, if actions at law were intended to include commissions of bankruptcy. But it would not in the slightest degree be eluded with respect to all the rest of the world, for the use and benefit of whom solely it was, as I humbly conceive, intended. It is *idem per idem* or a *petitio principii*.

It is said by Lord Mansfield in the next case, that *Mosely* is a book which ought not to be quoted; and the present Chief Justice Mansfield who argued the case, when it was cited against him, declared that it was the first time that he had ever heard of such a book.

But whatever is the authority of the reporter, he could not be so ignorant as to mistake the point he has stated; and Lord Chancellor King must have expressed a strong inclination not to support such a debt in bankruptcy; but his reporter has not preserved any reason worth repeating.

It must be observed too, that this is the petition of the bankrupt, who is particularly competent to dispute the truth, certainty and reality of the debt, as it must lie within his own knowledge.

The next case seems to be a solemn judgment upon the point by Lord Mansfield, and the other judges of the King's Bench, argued by the present Chief Justice Mansfield, and Sir Elijah Impey, afterwards Chief Justice of

sum of money whatsoever for or on account of such debt or debts; any law or statute to the contrary notwithstanding. (25) (For this note, vide post.)

India. *Quantock v. England*, 5 Burr. 2628, S.C. 2 Bl. 702. A. D. 1770.

"It was a special case, and the question was as to the validity of a commission of bankruptcy, the debts of the petitioning creditors being of above six years standing."

It was not stated that the bankrupt admitted that the debt had never been discharged; but only "that the bankrupt appeared and was examined by the commissioners."

Lord Mansfield says, "that the statute of limitations does not destroy the debt, it only takes away the remedy."

Sir James Burrow tells us "the other three judges, Mr. Justice Aston, Mr. Justice Willes, and Mr. Justice Blackstone concurred with the Chief Justice," that this objection lay only in the mouth of the bankrupt himself, that he had waived it by appearing, and submitting to the commission, and being examined under it; and that as the debt still subsisted, (though the remedy was taken away,) this was such an acknowledgment of it, as put it out of the power of a third person to make the objection."

This seems to be as solemn a judgment as can be pronounced by a court of justice.

And therefore we may expect that Lord Mansfield would act conformably at *nisi prius* nine years afterwards, as it appears he did. *Fowler v. Brown, Cooke*, 11.

But as the writer of these observations goes the length, that the statute of limitations has no effect whatever in bankruptcy, or that the commission is not within the statute, he must differ from these judges in the reason they gave, or that the bankrupt himself could have availed himself of the statute.

The bankrupt may deny the existence of this like all other debts. Upon that the commissioners must first exercise the functions of a jury, and then, upon a proper application, the chancellor may direct an issue to try the existence and certainty of the debt. This may be done in all cases, whatever is the duration of the debt.

Lord Eldon has lately decided that a commission of bankrupt is not included in the words *action or suit* in the

Notice of meeting to be given in the gazette.

26. And be it further enacted by the authority aforesaid, That where any commission of bankrupt shall issue

2 Geo. 2. c. 23. s. 23, which enacts, that no attorney shall commence or maintain any *action or suit* for fees until the expiration of one month or more after he shall have delivered to the party a bill of the fees. *Ex parte Sutton*, 11 Ves. 163.

An objection was taken upon a petition in bankruptcy, that the debt was a bill of costs due to the petitioning creditor as an attorney, which had not been signed and delivered under the act of parliament.

Lord Eldon said, "There is no doubt an attorney's bill is a legal debt, and he has all the remedies, that are not taken away by act of parliament: but the law has restrained him from bringing any action, except his bill has been delivered a month, but leaves him where he was, previously to that act, as to commissions of bankruptcy. The language of the act has not restrained this remedy, which is therefore open to him. And my opinion therefore is, that it is not necessary to deliver his bill."

These are the very words, if I could have expressed myself so well, which I would have applied to the word *action* in the statute of limitations with a reference to commissions of bankruptcy.

With the late decision, *Ex parte Dewdney*, as a commissioner I shall always comply; but I have collected these authorities to shew that we had some reason for our former practice.

Though the preceding reasons were collected, not by an advocate, who sometimes must argue against his own judgment, yet the reader must make allowances for the partiality for an inveterate practice.

And I ought still further to add, that the Lord Chancellor's judgment convinced many of the most judicious gentlemen in the profession; and that he offered the petitioners a case for a court of law, which was declined as desperate.

The Lord Chancellor concluded his learned argument by observing, that "upon the whole my opinion as to the general point is, that in the consideration of this statute a commission of bankruptcy is nothing more than a substitution of the authority of the Lord Chancellor, enabling him to work out the payment of those creditors, who

out from and after the twenty-fourth day of *June*, one thousand seven hundred and thirty-two, the commissioners

could by legal action or equitable suit have compelled payment; and that the objection upon the statute is competent to the creditors, and may be sustained. And I see no reason for holding that it is not competent to the bankrupt to take this objection, and if he waives it to creditors." 15 *Ves.* 498.

The chancellor has not said whether the commissioners, as often as they perceive the debt is within the statute of limitations, must reject the proof, but only where an objection is made by the creditors. This again raises a question, whether the commissioners and the chancellor are to act upon the objection of any one creditor, or the majority of the creditors, in value, held at an advertised meeting for the consideration of the subject.

But I presume Lord Eldon meant, that such a debt must be disallowed or expunged if any one creditor objects to it.

In the above case, the counsel observed, that the statute of limitations did not extend to suits in the admiralty and spiritual courts.

They also cited the following authority: Lord Chancellor King and Lord Ch. J. Raymond decided, that where a testator after six years incurred, makes his will, and charges his lands with the payment of his debts, it had been held that such will revives the debt, in regard the same, though the six years are passed, continues still to be a debt in conscience; and a defendant may, if he pleases, waive the benefit of the statute. *Jones v. Earl of Strufford*, 3 *P. Wms.* 89.

This has been disapproved by Lord Hardwicke, Lord Alvanley, and Lord Kenyon, but considered by Lord Hardwicke as established in *Lacon v. Briggess*, 3 *Atk.* 105, and *Ouchterlony v. Earl Powis*, *Amb.* 231. and adopted by Lord Mansfield in *Trueman v. Fenton*, *Cowp.* 544.

These are *debts* which may be owing, but their existence may still be disputed.

Sir Thomas Sewell held, that a trust for payment of debts would revive a bond after the expiration of twenty years; but that decision was afterwards held to be wrong. Lord Eldon, 15 *Ves.* 488.

therein named, or the major part of them thereby authorized, shall forthwith, after they have declared the

The expiration of twenty years without payment of interest or acknowledgment uncontradicted, is conclusive evidence that the bond is released.

But surely that rule of evidence would not prevail in bankruptcy, if opposed by the positive testimony both of the obligor and the obligee.

The chancellor observed, that "in the administration of assets, under a creditor's bill, *executors are not bound to plead the statute of limitations* : and if they do not, the creditor filing the bill will have a decree on behalf of himself and all other creditors, and *will be paid* ; but the constant course in the master's office is to take the objection against other creditors, and to exclude from the distribution those who, if legal objections are brought forward, cannot make their claims effectual : a case affording an analogy, which goes directly to the point."

The chancellor cited also the following authority :

The court of Common Pleas were clearly of opinion that the payment of the dividend under a commission against one partner, was such an acknowledgment of the debt, as took the case out of the statute of limitations with respect to all the other partners. *Jackson v. Fairbank*, 2 Hen. Black. 340.

Because the voluntary acknowledgment of one of several drawers of a joint and promissory note, takes it out of the statute of limitations as against the others ; and may be given in evidence, in a separate action against any of the others. *Whitcomb v. Whiting*, Dougl. 651.

I shall presume to observe, that in such a case in bankruptcy, moral justice or equity is not violated, because the creditor could have had no dividend unless a just and real debt had existed : and it is reasonable that the solvent partner should pay the remainder, which the honest declaration of the bankrupt, independently of the bankruptcy, would at any time have made him liable to pay.

And it would still be harder if the party who is not a bankrupt, by his acknowledgment could at any time subject the bankrupt to the liability of paying it, when he was deprived by his bankruptcy of all means of doing it.

person or persons, against whom such commission shall issue, a bankrupt or bankrupts, cause notice thereof to

The debtor to a bankrupt may plead the statute of limitations in an action by the assignee as he could against the bankrupt himself. Held by Lord King, *South Sea Company v. Weymondsett*, 3 P. Wms. 143. 1732. The same was decided in *Gray v. Mendez*, 1 Str. 556.

An honest man ought to have the same power of pleading it both in one case and in the other; a dishonest man ought not to be allowed to do in either.

Lord Hardwicke doubted, where a partnership owed a debt, whether the creditor could sue out a commission against one of the partners only; and he directed a trial before Lord Ch. Jus. Willes: and he said, afterwards, whatever doubts I might have before, it is now established to be law, on the unanimous opinion of the court of Common Pleas, that a commission of bankruptcy may issue against one partner only for a joint debt: though to be sure in an action at law against one partner, it could not be maintained unless the others are joined in it. *Ex parte Crispe*, 1 Atk. 133. 1744.

The judgment of Chief Justice Willes, in the above case, may be seen in *Willes Rep.* 467. *Crispe v. Perritt*.

From the admission of counsel and the declarations of the Ch. Justice, it is evident that at that time all joint creditors might prove under a separate commission, and receive a dividend, which they cannot now unless there is no solvent partner or no joint property. *Ex parte Ackerman*, 14 Ves. 604. Ch. Justice Willes, in *Crisp v. Perritt*, doubted whether the joint creditor ought to be allowed to petition for a commission, unless the bankrupt's share of the joint debt amounted to 100*l.* which it did in that case.

But there seems to be no reason for the doubt, as the creditor is entitled to receive a dividend upon the whole out of the partnership estate. If it were just 100*l.* it has all the effect of every separate debt of 100*l.*

A debt due from one partner to another, before there is settlement of their accounts, is not a legal debt to support a commission; but after their accounts are liquidated, or if one is indebted to another 100*l.* independently of the joint accounts, it will be the foundation of a commission. *Ex parte Nokes*, 2 Mont. 148.

The debt of the petitioner must be a legal debt upon

be given in the *London Gazette*, and shall appoint a time and place for the creditors to meet; which meeting, for

which an action may be brought in a court of law : a debt for which the creditor has a remedy only in a court of equity is not sufficient. *Exparte Hillyard*, 1 *Atk.* 147. *S. C.* 2 *Ves.* 407. 1751. The petitioning creditor's debt must be a legal debt, not a debt which can be recovered only in equity. The assignee of a bond or a chose in action therefore cannot petition. *Medlicott & Co. v. Str.* 899. 1731.

I find this first advanced by Lord Parker in *Exparte Lee*, 1 *P. Wms.* 783. 1721.: no reason has been given for it.

Sir Joseph Jekyll said, after observing that *bankruptcy* was a term not known to our common law, that there can be no such thing as an *equitable bankruptcy*, it must be a *legal one*. *Small v. Oudley*, 2 *P. Wms.* 427. 1727. He meant, I presume, that the judges at law must construe statutes, and their construction cannot be controlled by a court of equity.

The words *creditor* and *debts*, in this section, and in 13 *Eliz. c. 7. s. 1* and 2, must therefore by the judges be construed such only as would be so considered by a court of law.

In the case of an assignee of a bond, or of a chose in action, the commissioners admit the proof, by bringing both the assignor and the assignee before them: the one to swear that the debt was owing before the assignment, and that he has received no satisfaction, and the assignee, that he has received no satisfaction since.

Such is the mode of proof by a bankrupt and his assignees.

If the assignor and assignee were together to petition the chancellor, and make such a special affidavit of the debt, and join in the bond, it is probable that no objection could be made to the commission.

It is reasonable that all who can have a dividend under a commission should be enabled to sue it out.

Under this statute the assignees of a bankrupt may bring actions of their own accord, and may bring suits in equity, compound and refer by authority of the creditors, but the statute is silent respecting suing out commissions; but being authorized by a meeting of the creditors, if the bankrupt and the assignees were to join in the petition, affidavit and bond as I have just described, I conceive

the city of London, and all places within the bills of mortality, shall be at the *Guildhall* of the said city, in order Irish stat. sect. 18.

the chancellor would not object to the commission, and that it would be held valid in a court of law.

An infant cannot be a petitioning creditor, because his bond to the chancellor would be void. *Ex parte Barrow*, 3 *Ves.* 554.

But as every one ought to have the benefit of a commission, who can sue at law, I should think the guardian, or the *prochein ami*, and the infant together, might join in the affidavit and the bond.

A debt unsettled, if the balance due to the petitioner is sufficient, will support a commission. *Flower v. Herbert*, 2 *Ves.* 327.

A solicitor may sue out a commission without delivering his bill according to the statute. 2 *Geo.* 2. c. 23. See ante, p. 232. *Ex parte Sutton*, 11 *Ves.* 163.

Or whilst it is ordered to be taxed, and all proceedings in the mean time to be staid. *Mosely*, 27.

But the commission will be void, if the bill is reduced by taxation under one hundred pounds.

Every attorney's bill must be taxed before it is proved under the commission after the opening.

If a creditor after notice of an act of bankruptcy receives so much of his debt as to reduce it under 100l. he may sue out a commission.

For he would have had no right to retain it, if another person had sued out the commission; and in bankruptcy such a payment is void. *Man v. Shepherd*, 6 *T. R.* 680.

It would be the same if the debt was above 100l. and the whole had been paid with a knowledge of an act of bankruptcy.

A sum awarded by an arbitrator is a good petitioner's debt, as an action may be brought upon it: and it is no objection that a bill is filed, or any other proceeding instituted to set it aside, otherwise it would be in the trader's power to frustrate the effect of the award, and to gain time to dissipate his effects. *Ex parte Lingood*, 1 *Atk.* 240.

If a trader is a surety for another, a commission may be

to choose an assignee or assignees of the said bankrupt's estate and effects : at which meeting the said commission-

sued out against him, as if it were his own debt. *Heyler v. Hall, Palm. 325, A. D. 1622.*

A husband alone cannot sue out a commission upon a debt due to his wife as executrix or administratrix, for he cannot swear to the debt as due to himself. *Ex parte Scaples, 17 Vin. 67.*

If the debt is due to the wife, in her own right, I should think the husband and wife ought to join, as they do in an action at law ; and if the husband should die before the dividend, the right to it would survive to the wife.

If the bankrupt is indebted to a partnership, or to two obligees in a bond, one alone cannot petition, they must all join. *Buckland v. Newsame, 1 Taunt. 477.*

But one may afterwards prove the debt, execute a power of attorney to vote in the choice of assignees, sign the certificate, and do all other acts to bind the rest. *Ex parte Mitchell, 14 Ves. 527.*

If the creditor has a mortgage or pledge, he may sue out a commission, but he must state what his security is, when he proves his debt at the opening of the commission.

A debt contracted before trading, or during the trading, will support a commission; but not a debt contracted after the party has left off trade : this was first decided in the King's Bench. *Anon. 1 Vent. 5. A. D. 1668.*

The law seems to be well explained by Lord Holt, thus : " Though a man quits his trade, yet he may be a bankrupt for the debts that he owed before. And though a man who has become creditor to him after the quitting of his trade cannot sue a commission of bankrupt for such debts contracted after, yet if the old creditors sue a commission of bankrupt, this new creditor shall be admitted to have a share of the bankrupt's estate. And if A. being a trader, becomes indebted to B. in 100l. and then he quits his trade, and afterwards becomes indebted to B. in 100l. more, and afterwards A. pays to B. 100l. not expressing upon what account : since so much in quantity is paid to B., as was due to him from A., when A. was capable of being a bankrupt, it would be too rigorous to admit B. to sue a commission of bankrupts for the old debt of 100l."

ers shall admit the proof of any creditor's debt (that shall live remote from the place of such meeting of the com-

But to this point, he said, that he would not give an absolute opinion." Note: All this that Holt, chief justice, said, was not contradicted by any of the other judges. *Meggot v. Mills*, 1 Lord Ray. 286, 1697.

Lord Eldon has said, "Upon the point which has been taken at the trial, whether a commission can be sustained by an act of bankruptcy, committed after retiring from trade, the debts contracted in the course of trade remaining unpaid, I shall say no more, than that my clear opinion, unqualified by any doubt is, that the commission may be sustained; and I should not have heard so much upon it, if I had not understood that two of the judges held different opinions upon that question at the assizes." *Ex parte Bamford*, 15 Vez. 458.

If this were not so, every trader might avoid all the consequences of bankruptcy, if he should cease to trade before he had committed an act of bankruptcy.

The executor of a bankrupt, unless the commission against his testator has been superseded, cannot take out a commission of bankrupt for a debt due to the testator, for such debt vested in his assignees, and consequently the executor not entitled at law to be the petitioning creditor. *Ex parte Goodwin*, 1 Atk. 100.

That is the whole of the report in Atkyns: it ought to be added, if the testator had not obtained his certificate.

Where one partner had paid his share of a joint debt to another partner for him to pay the joint creditor, which he omitted to do before he became bankrupt, this debt might be proved under his commission. *Wright v. Hunter*, 1 East, 20.

And if the partner had paid the joint creditor and had called upon the other to restore what he had paid him; upon his refusal, it would no doubt be a debt which would support a commission.

The petitioning creditor's debt was exactly 100l. but payable upon a note at a distant future day, and by the preceding section debts payable at a future day, upon a written security, will support a commission; but it was objected that when the discount was deducted the debt under this section was less than 100l. But the court of King's Bench held the commission was valid. The statute

missioners) by affidavit, or, being of the people called *quakers*, by solemn affirmation, and also permit any person

has made no distinction between the amount of present and future debts; and by the 7 Geo. 1. c. 31, the discount must be deducted from the dividend, and not from the proof. *B. R. Hil.* 1811.

When the petitioning creditor proves his debt at the opening of the commission, the most satisfactory mode is to produce a bill of particulars, and to file it with the proceedings, and the petitioning creditor swears the bankrupt is indebted to him in such a sum, according to the account annexed. The petitioner's creditor must afterwards prove his debt under the commission. Or he can derive no benefit from it.

I come now to the consideration of the bond to the chancellor. It is a mistaken notion that it was first introduced by this statute, or by the expired statute, the 5 Ann. c. 22. s. 7.

It existed in practice long before that statute, in which it is first mentioned.

Serjeant Goodinge, who wrote in the reign of *Will. 3d*, gives the "form of the bond to the chancellor, or lord keeper, upon suing out the commission of bankrupt."

The obligation is in Latin, the condition is in English. Serjeant Goodinge has left blank the penalty of the bond. It perhaps might vary according to the discretion of the chancellor.

We have seen that the affidavit that the bankrupt's debts amounted to 100*l.* and that the petitioner believed him to be a bankrupt, must have rested only upon an order of the chancellor.

Treby, Ch. J. is reported to have said, that it is not necessary to prove that the bankrupt was indebted in 100*l.* though the practice has been to do so; because though the chancellor before he grants a commission frequently requires such proof, yet it is only matter of discretion in him. *Smith v. Blackham*, 1 Lord Raym. 724. N. P. 10 W. 3.

But the condition was as follows: "The condition of this obligation is such that if R. R. merchant, be a bankrupt, according as A. B. by his petition, &c. hath alledged, then this obligation to be void or else to stand in full force."

I cannot therefore agree to what Lord Hardwicke has

duly authorized by letter of attorney from such creditors, oath or affirmation being made of the due execution

said, that a *commission of bankruptcy is as much ex debito justitiæ* as a writ, 1 *Atk.* 218; unless the proposition means that every thing is *ex debito justitiæ*, if we comply with the conditions which the legislature or a sound discretion has prescribed.

The bond now required by the statute did not take away the common law remedy by action, for maliciously suing out a commission, as for a malicious prosecution. *Brown v. Chapman*, 3 *Burr.* 1418.

In that action 2000l. or 20,000l. might not be thought by a jury too great damages.

Lord Hardwicke said, it was in the breast of the court where the bankruptcy was a doubtful case, and the commission superseded, either to direct an inquiry before a master of the damages sustained by the bankrupt, or a *quantum damnificatus* upon an issue at law, and after the damages are settled, the court might, for the better recovery thereof, order such bond to be assigned; but the present case was attended with such flagrant circumstances that he assigned the whole penalty of the bond. *Ex parte Gayter*, 1 *Atk.* 144. 1749.

In a case where the chancellor assigned the bond to the party against whom the commission was sued out, who brought an action upon it, the defendant pleaded that the commission was not taken out fraudulently or maliciously, to which the plaintiff demurred generally.

Lord Kenyon said "it is clear that the legislature did not intend that the court, in which the action is brought, should examine into the question of fraud or malice."

To the objection that there would then be nothing to try, Mr. J. Laurence observed, the defendant may plead performance, *non est factum*, or that the bond was not assigned. *Smith v. Broomhead*, 7 *T. R.* 300. 1797. The statute says expressly the chancellor shall order satisfaction.

In the next case the chancellor assigned the bond not to the party the supposed bankrupt, but to a creditor, who had obtained a *supersedeas* of the commission, in which the bond was given, and who was an assignee under a subsequent commission. The defendant put in a long plea;

thereof, either by an affidavit sworn, or affirmation made before a master in Chancery, ordinary or extraordinary, or

the effect of it was, that the chancellor had made such orders for the payment of costs to the plaintiff, besides the assignment of the bond, that he was not damnified.

Lord Ellenborough said, "the bond might be assigned to a creditor as a *party grieved*; every creditor may be said to be a party grieved by a fraudulent commission.

"The order of the chancellor upon the party to pay the damage he ascertained, would only attach upon the person of the petitioner, and not upon his estate; and therefore it was thought expedient to give a remedy at law, which would bind his property."

"If the bond be forfeited, he may assess the damages to the whole or any part of the penalty; and where the bond is assigned generally without any abridgment, we must take it he has ordered the whole penalty to be recovered at law." *Smithey v. Edmonson*, 3 East. 22. 1802.

Lord Eldon said, it had been decided as above that no one can dispute the finding of the lord chancellor, who is to act as a jury; and if he assigns the bond, that is decisive evidence that the commission was maliciously sued out.

But having proposed that the damages should be ascertained by the master, or in an issue *quantum damnificatus*, the order was made to supersede the commission with costs without prejudice to an action. *Esparte Lane*, 11 Ves. 415. 1805.

In a subsequent case, where the conduct of the petitioning creditor had been improper, and having himself become a bankrupt, the chancellor ordered that the person against whom the commission was sued out should receive 30l. which he might prove under his commission. *Esparte Rimene*, 14 Ves. 600.

In Wydown's case, 14 Ves. 80, Lord Eldon has stated the mode by which a commission of bankrupt is sued out, but with some little inaccuracy particularly with regard to the bond. I know his lordship's candour too well to think he will be displeased if I should presume to suppose that my inquiries into the subject have enabled me to state it rather more correctly.

Lord Eldon has said that he supposed that when the

before the commissioners, *viva voce* (which oath or affirmation they are hereby respectively authorized to administer)

affidavit of the belief of the act of bankruptcy was framed, attention had been paid to this section. I have shewn in p. 206 that it is much more ancient.

His lordship then proceeds to state, "nor is there in the bond any thing requiring the obligor to prove that an act of bankruptcy had been committed at the date of the bond, but that the party was a bankrupt at the time of taking out or issuing the commission." Lord Eldon said this, thinking that the bond would be drawn as the statute directs; but in fact it is not: that part of the condition is precisely the same now as it was in the time of Serjeant Goodinge, before this statute, and even before the statutes of Queen Anne. See *ante* 240.

The condition there is, the obligation shall be void if A. B. *be* a bankrupt, and now it is if A. B. *is become* a bankrupt. Lord Eldon proceeds to say "the bond is to be assigned only upon failure to prove him a bankrupt at the time of suing out the commission."

That is agreeable to the statute, viz. that upon such failure the chancellor is impowered to assign the bond to an assignee, who can sue in his own name.

But the bond is in fact given to the chancellor upon condition that the party *is become* a bankrupt, which must mean at the time of the execution of the bond; if then he was not a bankrupt at that time, but has become one before the date of the commission, the bond in such a case would be forfeited; but it could not be within the statute; and if it were assigned, the assignee could not sue in his own name, but the action must be brought in the name of the lord chancellor.

In Wydown's case, Lord Eldon made a most important decision, viz. that the commission was valid, if an act of bankruptcy was committed on the same day at any hour or minute prior to that in which the seal was affixed to the commission, though no act of bankruptcy had been committed when the docket was struck, that is, when the petitioning creditor's affidavit and bond were deposited in the office, and the usual entry made in the docket book.

and in case of creditors residing in foreign parts, such affidavits or solemn affirmations to be made before a magis-

His rashness in making the affidavit was not to affect the rest of the creditors. 14 Ves. 80.

What Lord Eldon has said in this case induces me to hope that he will approve of my animadversions upon Lord Kenyon's judgment in the case of *Gordon v. Wilkinson*, 8 T. R. 507. see ante, p 214.

Lord Eldon has declared that the consequences of striking a docket, not for the purpose of prosecuting the commission, but for the purpose of arrangement, are so serious, that they call for the observation, that those who swear to their belief that an act of bankruptcy has been committed, should be able to assign some solid reason for that belief. *Ex parte Bourne*, 16 Ves. 147.

It may not be improper here to state the exact steps of the present practice in suing out a commission.

In the country the petitioning creditor goes before a master extraordinary in chancery, and swears to the amount of his debt, and that he believes his debtor is become a bankrupt; and he executes the bond, and then both are sent to an agent in London: if the petitioning creditor resides in London, or in the vicinity, he must make his affidavit before a master in chancery; and the bond will not be received, unless it is executed at the bankrupt office. When the affidavit and bond are delivered, in each case, at the office, and an entry is made in the docket book, the petitioning creditor is said to have struck a docket.

No petition is now carried to the bankrupt office as used to be done formerly.

The word originally was *dogget*, which is used throughout the statute 4 and 5 W. and M. c. 20, which directs that all judgments to affect lands shall be put into an *alphabetical dogget* as something that was well known at the time. This dogget, or as it is now pronounced docket, contains an abstract of the judgment; so probably the dogget or docket in bankruptcy contained an abstract or memorandum of the petition, affidavit and bond of the creditor or creditors who sued out the commission.

I have fully shewn before that a complaint in writing is required by the 13th Eliz, and therefore must be co-

trate, where the party shall be residing, and shall, together with such creditors letters of attorney, be attested by a

eval with it; and it is probable that the affidavit and the bond followed soon afterwards, though the date of their origin cannot be fixed; but it is abundantly certain that they had been required by the great seal before they were introduced into the expired statutes of Queen Anne.

The word docket is never mentioned in any of the bankrupt statutes before the 46 Geo. 3. c. 135. s. 3. The etymology of the words *striking a dogget* or *docket*, though we are now familiar with the meaning, I cannot learn or form a conjecture of.

In Lord Erskine's order, 29th Dec. 1806, it is declared, "that no docket shall hereafter be considered as struck until the same shall be entered in the docket book."

The docket book is arranged alphabetically, and each page is divided into seven columns, at the head of each of which respectively is written as follows:

Bankrupt.	Description.	Residence.	Solicitor or Agent.		Docket struck.	Date of Commission.
			Residence.			
A. B.	Merchant.	Liverpool.	C. D.	Chanc.-lane.	Sept. 20.	Sept. 24.

If the bankrupt's name begins with B, then it is entered as above at the end of the names beginning with B; and to search if a docket is struck, the person is only to begin with the last B. and to go back till he is satisfied. He pays 1s. for the search.

After the docket is struck, the solicitor within the next four days *bespeaks* the commission; he then pays the fees for it, and the clerks make out a petition, and procure for him a commission from the office of the patentee. They are tacked together, and at one corner of the petition the *fiat* is written, viz. "Let a commission issue as prayed, and be directed to John Nares, Edward Christian, Robert Talbot, Robert Capper, and Francis Vesey, Esquires" (or as the case may be.)

The petition and commission are taken together to the chancellor, and he signs the *fiat*, "Eldon C." and then the commission is immediately sealed either in private, or at a public seal. The commission always bears date the day it is sealed; and that date is then entered under the column left for it in the docket-book.

notary publick, to vote in the choice of an assignee or assignees of such bankrupt's estate and effects, in the place

(24) See page 221. In the decisions under this section there is much contradiction; I shall therefore state them concisely according to their dates.

In the first the petitioning creditor struck a docket upon a mistaken act of bankruptcy; the debt was paid by the debtor, the chancellor ordered it to be paid back to the estate of the debtor, upon the ground, as it appears, that the transaction was an abuse of the process of the court. *Ex parte Thomson*, 1 *Ves. jun.* 157. 1790.

But the case is extremely confused. In the next case a docket was struck, and the petitioning creditor compromised his debt by receiving bills of exchange for his debt. A commission was sued out by another creditor, and the former creditor delivered back the bills and applied to prove his debt under the commission; but the commissioners and the chancellor afterwards held that his debt was forfeited under this section. *Ex parte Gedge*, 3 *Ves.* 349. 1797.

In Wydown's case, 14 *Ves.* 85, Lord Eldon observed upon this that a court of justice is not justified in extending a penal clause of an act of parliament against the direct, plain, and obvious expression of that clause.

In the next case, securities were obtained by the creditor after, not merely a docket struck, but a commission actually issued. Lord Eldon held that the words "*shall* privately have and receive more in the pound than the other creditors" must be construed "*may*."

The statute not merely prohibiting the transaction but making it an act of bankruptcy proceeds upon this reason, that the proof that an act of bankruptcy was committed, may be in the power of the first petitioner creditor, but it may not be within the reach of any other creditor.

The statute throughout the section calls the person who so compounds with the creditor a *bankrupt*; and Lord Eldon expresses a doubt, which it was not necessary for him then to remove, whether this clause means a person actually a bankrupt (that is a trader who has committed an act of bankruptcy) or so treated by those who take out the commission.

and stead of such creditor; and the commissioners, or the major part of them authorized, shall assign every such

It is privately though one or two individual creditors know of it.

He decided the original debt was forfeited, and that the proof the creditor had made under the new commission should be expunged, and the creditor who had been elected assignee under it should be removed. *Ex parte Paxton*, 15 Ves. 461.

Soon afterwards Lord Eldon decided that he had no right to consider a docket struck as the issuing of a commission; and that the legislature has not prohibited this act, and attached to it these penal consequences unless it is done after the issuing of a commission. The money paid after a docket may be ordered to be repaid, and the security avoided as for a gross contempt; and the party may be ordered to pay the costs of superseding the commission, and may be removed as an assignee, but still his original debt is not forfeited, but may be proved under the next commission. *Ex parte Browne*, 15 Ves. 472.

With regard to the doubt expressed by Lord Eldon in *Ex parte Paxton*, whether the second commission can be supported unless the party compounding with the petitioning creditor of the first, had committed an act of bankruptcy, as he is every where throughout the section called a *bankrupt*; I should only observe upon it that the trading under the second commission must still be proved, and that nothing would be gained if the act of bankruptcy prior to the first commission must still be proved. The word *bankrupt* seems to be an inaccurate expression used for conciseness for the party against whom the commission was sued out.

(25) See page 231. This section in effect repeals the 1 J. 1. c. 15. s. 4. which continued in force till this time. See my observations upon it p. 25 ante.

It appears by Serjeant Goodinge, p. 45, that the commissioners used to appoint a treasurer to receive the contribution money, being so much in the pound upon the debt proved as they thought fit to direct.

The commissioners must tax the costs of the bill of the solicitor of the petitioning creditor, including the costs of the assignment and the day when the assignees are chosen.

If the commissioners are thought to allow too much,

for and on the behalf of any creditor, shall be permitted to vote in such choice of assignee or assignees, whose debt

But the joint creditor who sues out the commission has every right of a separate creditor. *Ex parte Ackerman*, 14 Ves. 604. *Ex parte Alcock*, 11 Ves. 603.

In a case where separate creditors had proved and voted in the choice of assignees under a joint commission, Lord Eldon said, "it is a rule not to disturb the choice of them where the commissioners have honestly exercised their discretion; but here the question is, whether they have not been elected by persons who had no right: it is a fixed rule, that joint creditors cannot interfere in the choice of assignees under a separate commission; and the converse of the rule holds, that separate creditors cannot vote in the choice of assignees under a joint commission." *Ex parte Parr*, Rose 78.

The reason is evident why joint-creditors cannot vote in the choice of assignees under a separate commission, because they cannot prove to receive a dividend with the separate creditors; they have no interest in the estate but from the possibility of a surplus, they are not within the words of the statute.

But the case is quite different with the separate creditors under a joint commission: no distinction between separate and joint debts is made by the statute; but the choice shall be made by *the major part in value of such creditors according to their several debts then proved*.

Besides there is no reason or equity that the joint creditors should have a priority. Each separate creditor has an immediate interest and a possibility from a surplus; so has each joint creditor. If A. and B. are partners, and their separate estates and the joint estate are 5000l. each, and the separate debts of A. 10,000l., of B. 10,000l. and the joint debts 10,000l.; have not in this case the separate creditors and joint creditors precisely the same interest in appointing trust-worthy persons to administer the effects? and will not in all other cases the interest of the separate creditors be probably as great as the joint creditors?

Before this decision the practice was the contrary; and the practice seems to have convenience in its favour.

The proofs are made promiscuously, and they need not be separated till a certificate is granted, or a dividend declared; previous to which time there is no leisure to do it.

or the debt of the person or persons so authorizing him to vote, shall not amount to the sum of ten pounds, or upwards. (27) (For this note, vide post.)

A joint commission must be taken out by a joint creditor; but if there were only one joint creditor and he were chosen assignee, and if he died or were removed or became a bankrupt, who could vote in the choice of a new assignee if the separate creditors were excluded?

If this subject should ever be reconsidered by the lord chancellor, it may perhaps meet with a different decision.

One creditor may elect himself, if his debt is greater than the debts of all the other creditors qualified to vote. Value, or amount of the debts, only is regarded.

In case of a dispute the commissioners must decide by asking each creditor whom he votes for, and putting down the amount of his debt; and if some vote for A.; some for B.; some for A. and B. together, then the choice must be declared according to the greatest of these three sums.

It is not necessary that the assignee should be a creditor, but the choice should be made of a person present, who declares his consent to act as an assignee.

If the majority of the creditors in value elected a person who was absent, the commissioners ought to tell them to proceed to another election; or if they thought it proper, they might adjourn the choice of assignees to another day.

They are only bound to assign to one who is ready to accept the assignment and to execute the counterpart.

The chancellor will not postpone the choice or order a new choice, because the creditors living abroad could not vote. *Ex parte Greignier*, 1 Atk. 90.

When the creditors present had proceeded to the choice of assignees within the hour after the commissioners had met, and several had gone away, but a creditor came before the expiration of the hour, and proved his debt and wished to join in the choice, it was made a question whether the former election could be disturbed?

By the 2d section, two days or more besides the forty-second must be appointed to take the bankrupt's surrender. This section requires that a time shall be

Mutual credit
to be settled.

28. And be it further enacted by the authority afore-
said, that where it shall appear to the said commissioners,

appointed for the choice of assignees, but it does not say
that it shall be on any of the days fixed for the surrender.

The statute directs that debts shall be proved on the
choice of assignees, and at the making of the dividend,
but proof of them is admitted at every public meeting.
The creditors are always directed by the public notice to
attend one hour before the commissioners, that they may
be assembled and prepared to proceed to business imme-
diately when the commissioners appear. If then the
meeting was advertised for the choice of assignees alone,
there seems to be no reason why the commissioners
should not immediately proceed to the election, as soon
as all present had qualified themselves to vote, by
proving their debts. The statute does not require it,
and it has never been the practice to wait one hour be-
fore the assignees were chosen. Unless the commissioners
perceive some designing haste in the creditors present,
there appears to be no reason to delay it beyond the hour,
or after all who are present have proved. The commis-
sioners frequently stay several hours, but the opinion
prevails universally in practice that they are not bound
to stay more than one hour, except on the last day, even
to receive the bankrupt's surrender.

After the choice of assignees, the commissioners would
stay an hour to receive the proof of debts, to prevent the
creditors from having the trouble of coming again.

The following case occurred before our list: the bank-
rupt having no property, no one would act as assignee;
and having adjourned the choice once or twice without
effect, we certified the fact to the chancellor, and recom-
mended that he would make an order to supersede the
commission if the petitioning creditor would not accept
the office of assignee. Lord Eldon made the order, and the
petitioning creditor became the assignee.

Where the bankrupt could prove a debt under his
own commission as a trustee, or where he became the
personal representative of a creditor who had proved,
Lord Hardwicke held he might vote and chuse himself
assignee. *Cooper's case, Green, 260.*

But every assignee who becomes a bankrupt must now

or the major part of them, that there hath been mutual credit given by the bankrupt, and any other person, or

be removed by the commissioners. Order 8th March, 1794. The bankrupt in such a case might vote for any other person.

If a person by signing a deed of assignment, or joining in concerting an act of bankruptcy, had precluded himself from being a petitioner, still he may act as assignee, under a valid commission. *Judson v. Irvin*, 2 Camp. 48.

Wherever the commissioners see good cause, they may adjourn the choice of assignees, either to the 3d meeting, which would save the expence of a meeting, but if so long a time would occasion a greater loss to the estate, to any shorter day they may think proper.

This section has a reference to the former statutes upon the subject. The 13 Eliz. c. 7. s. 2, gave the commissioners power to sell all the bankrupt's property both real and personal. See p. 11 and 12 *ante*. They take no interest in it, but have only a power to convey it.

But it was thought that that power did not extend to a debt due to the bankrupt: the 1 J. 1. c. 15. s. 13, therefore gave the commissioners power to assign a debt due to the bankrupt, so that the assignee might sue for it in his own name.

The assignees before the 5 Ann. c. 22. s. 4, were appointed by the commissioners only upon the authority of the statutes referred to.

At the first it was the practice for the commissioners to sell the bankrupt's effects, and assign his debts to the creditors as their dividend.

Hence we find this decided, that if a bankrupt be indebted to one 20l. and to another 10l. and he hath a debt due to him by bond of 20l. now the commissioners may assign and divide this (viz.) to every creditor a portion, part and part alike, and the assignees it seems may sue severally for it. *Godb.* 195. *Serjeant Goodinge*, 146.

And they might assign money to one, and corn to another of the creditors. 2 *Bulst.* 26.

But before the 5 Ann. c. 22. s. 4, when the assignees were chosen by the creditors, *Serjeant Goodinge* tells us that it had become the constant course and practice to make an assignment to one or more creditors in

mutual debts between the bankrupt and any other person at any time before such person became bankrupt, the

trust for themselves and the other creditors. *Goodinge*, 148, second edition.

This section has followed the 5 *Ann. c. 22*, but except as far as this statute has made an alteration in particular instances, the effect and operation of the assignment will be the same as it was before the 5 *Ann. c. 22*.

The form of the present assignment is effectually the same as that given by Serjeant Goodinge before the reign of Queen Anne. The covenant on the part of the assignee or assignees to indemnify the commissioners for all their lawful proceedings under the commission existed then and has been continued to the present day. It is not required by any statute.

In a late case, where the commissioners had committed a witness, who brought an action against them, but was nonsuited, the commitment being held to be lawful, the commissioners were obliged to pay their solicitor 270l. costs; the assignees petitioned that the chancellor would restrain them from bringing an action against them upon this covenant, because they had not recovered even sufficient property to pay the costs of the commission; but Lord Eldon held he had no power to restrain the commissioners.

The assignees petitioned also that all the creditors who had proved might be called upon to contribute to relieve the assignees; but the chancellor said he did not see any way by which he could assist the assignees in that point. *Ex parte Linthwaite*, 16 *Ves.* 234.

The assignees sign a counterpart, in which they covenant to account for so much money as each shall receive to the commissioners. This covenant was in the assignments before the time of Queen Anne, and it is still continued. It is not required by any statute.

If the assignee dies, having received money from the bankrupt's property, this covenant being under hand and seal, it is of the nature of a specialty debt, and the commissioners have a remedy against the assignee's real property in the hands of his heir. *Primrose v. Bromley*, 1 *Atk.* 89.

said commissioners, or the major part of them, or the assignees of such bankrupt's estate, shall state the account

If the bankrupt takes real property by descent, that property is bound by the specialty debt of the ancestor in the hands of the assignees, and if they have converted it into money, the chancellor upon petition will order them to discharge it in full, the bankruptcy not being in this instance considered an alienation. *Ex parte Morton*, 5 Ves. 449.

So if a bankrupt makes his will, leaving real property, and should become a bankrupt, and die: if there were a surplus, the assignment would not be a revocation, but the devisee would be entitled to the surplus, out of the estate devised. *Charman v. Charman*, 14 Ves. 580.

This important decision was made by Sir William Grant, master of the Rolls.

If the commissioners execute a bargain and sale to the assignees of all the bankrupt's real estate, at the time of the execution of the deed; if other real property come to him before he obtains his certificate, they must execute a fresh conveyance of it. *Ex parte Proudfoot*, 1 Atk. 253.

But no new assignment is necessary of newly acquired personal property. *Kitchen v. Bartsh*, 7 East, 53. See *ante*, p. 29.

Where the testator left a sum of money to his widow for life, and after her death to be divided amongst such of her children as should be then living. The bankrupt, her son, survived the mother, and he had then his certificate; but it was held, his interest passed by the assignment: his interest though contingent, he might have released in his mother's life-time. *Higden v. Williamson*, 3 P. Wms. 132, 1791.

It was said by the master of the Rolls in the next case, that that decision was the occasion, that by the 5 Geo. 2. c. 30. s. 1. the bankrupt must disclose every estate, by which he expects any profit, or possibility of profit.

But where the bankrupt took an estate by descent, after he obtained his certificate, the master of the Rolls held the chance of the inheritance was not a possibility that can be assigned or released, or such as he need disclose upon his examination. *Moth v. Frome*, Amb. 394, 1761.

between them, and one debt may be set against another, and what shall appear to be due on either side, on the

In the former case, it was a vested remainder, which could only be divested by his dying before his mother; but the possibility of an inheritance not only depends upon survivorship, but it may be defeated by the deed or will of the ancestor.

This section directs that the commissioners shall assign every such bankrupt's estate and effects unto such person or persons as the creditors shall choose.

By the 13 *Eliz. c. 7. s. 2*, the commissioners by a deed indented and enrolled may convey all the bankrupt's copyhold estates. In my note to section 3 of that statute, I have cited with approbation, Lord Hardwicke's recommendation to commissioners not to include the copyholds in the bargain and sale to the assignees, but to convey them immediately to a purchaser. See p. 13 *ante*.

The object was to save one fine to the bankrupt's estate. That is the practice of commissioners to this day, in which I myself have not unfrequently concurred.

But upon considering what Lord Hardwicke has said in *Drury v. Man*, 1 *Atk.* 95, with the words of this section, I cannot think the practice could be supported if it were resisted by any lord of a manor. Lord Hardwicke recommends that the copyhold shall not be included in a *temporary assignment*, that is, what we now call the *provisional assignment*: but if it were so included the lord would be entitled to three fines, for the provisional assignee by section 30 must convey to the general or absolute assignee all that was conveyed to him by the commissioners.

The words in this section are clear and peremptory that the commissioners shall assign to the assignee chosen every estate and effects of the bankrupt.

The commissioners therefore seem bound to convey the copyhold by bargain and sale enrolled to the assignee only, and he must convey in the usual manner by surrender to a purchaser. Our pity for distress cannot repeal the positive declarations of the legislature.

Lord Hardwicke in the above case observes, that "it would be very proper the legislature should remedy this inconvenience with regard to copyhold estates."

balance of such account, and on setting such debts against one another, and no more, shall be claimed or paid on either side respectively. (28)

Where a father upon the marriage of his son had covenanted to pay fifteen pounds a year for his life, and the son became a bankrupt: upon a bill filed by the assignee against the father, "the court said an assignee under a statute of bankrupt is not entitled to have the performance of an agreement made with the bankrupt; and that it was so adjudged in the case of Drake and the mayor of Exeter." *Moses v. Little*, 2 *Fern.* 194, 1690.

In the case of Drake v. Mayor of Exeter, that was a covenant to renew a lease; and the chancellor referred the case to two of the judges, and they certified that the commissioners could not assign the covenant. 1 *Ch. Cas.* 71. 1665.

No reason is assigned in these cases for the judgment of the court: it is therefore necessary to examine the principle or ground, upon which they were founded.

When these cases were decided, the court could only refer to the 13 *Eliz. c. 7. s. 2.* and the 1 *Jac. c. 15. s. 13.*

These authorize the commissioners to grant and convey the bankrupt's lands, tenements, hereditaments, goods, chattels, and debts. The object of the latter statute was only to enable the assignee of a debt to sue in his own name.

The words "which the bankrupt *can depart withal*," apply only to his interest in lands, tenements, and hereditaments in the 13 *Eliz.*

An agreement, contract, or covenant with the bankrupt, however beneficial to him, would not be considered as comprized under any of the words of these statutes.

Keeling, C. J. said the bankrupt may have trespass, or covenant, &c. where damages are uncertain, which was agreed; but any *debt* certain is assignable. *Holt v. Scarisbrig*, 2 *Keble*, 372.

This was a sound construction of the then existing statutes.

But this section which directs that the assignees are to be chosen by the creditors, the commissioners must

Penalty on
debts falsely
claimed.

29. And whereas many abuses have been committed by pretended creditors of bankrupts; be it enacted by

assign to them *every such bankrupt's estate and effects*; and by the first section of this statute he is to discover his effects and estate real and personal, whereby he *expects any profit, or possibility of profit*.

Hence, I think it may be safely concluded that a covenant, contract, or articles of agreement for the bankrupt's benefit, which he himself could assign to another, or which would descend to his heir, or which his personal representative could have the benefit of, either at law or in equity, may be considered as his *estate and effects* under this statute, and will pass to his assignees either by a bargain and sale, or by the assignment.

But a right of action to recover damages for trespass *vi et armis*, or upon the case, for defamation, is neither assignable nor transmissible; for though there is a possibility of profit, yet the unascertained damages cannot be considered a *debt*, or an *estate* or *effects* till a judgment is obtained.

A right of action to recover real property passes by the bargain and sale of the commissioners to the assignees. *Smith v. Coffin*, 2 Hen. Bl. 444, 1795.

In that case, Ch. J. Eyre observed, that "the right to the plaintiff was an hereditament, and the words of the several statutes are large enough to comprehend it."

Mr. J. Buller, "as to the case in *Vernon*, I very much doubt the authority of it."

He did not advert to the state of the bankrupt statutes, when those decisions were made. And he concluded his judgment by saying, "I therefore hold that every species of right, of which by any possibility profit can be made, passes to the assignees."

But this last sentence has been advanced without a due regard to the words of the present statute, for it has never yet been supposed that they extend to a right of action for a tort to the bankrupt, of which by possibility profit could be made. That right of action still remains in the bankrupt, but if he should obtain a judgment before his certificate, then the assignees might claim the benefit of the judgment, as a debt due to him.

Though there is an old case in the 5 Car. 1. 1629. where a trader had recovered damages for words, and

the authority aforesaid, that if any person at any time hereafter shall, before the acting commissioners in any

after judgment sued out execution, and the damages and costs were levied by the sheriffs, but before the money levied was paid to the plaintiff, he became a bankrupt, the commissioners sold and assigned, according to the statutes then existing, this money in the hands of the sheriff.

The sheriff brought the money into court, and the question was who should take it, whether the plaintiff, the bankrupt, or the assignee; and three of the judges, after two arguments, held it did not pass by the assignment, but that it was in *custodiâ legis*, and none but the plaintiff could give a discharge for it upon the record. Hyde Chief Justice was of a different opinion. *Benson v. Flower, Cro. Car.* 166, 176.

There would be little doubt but all the judges of the present day, would be of the same opinion as Lord Ch. Justice Hyde, though the law now in that case is the same as it was then.

But if a trader should recover a verdict for damages ever so large, and become bankrupt, if he did not enter up judgment himself, the assignees could derive no benefit from it.

If a trader lose above ten pounds at one time at gaming, his assignees may recover it back within three months. The court considered this as a debt, though Ch. J. Eyre was of a different opinion. *Brandon v. Pate, 2 Hen. Bl.* 308.

In a case where the bankrupt and his assignees joined in a bill for a specific performance of an agreement for a lease either by making the lease to the bankrupt or to his assignees, there was a demurrer to the bill. Lord Loughborough said "this is not a point for a demurrer; which must be a neat short point, an absolute denial of the title of the plaintiff.

"The mischief is, that I am hearing a cause consisting of a variety of circumstances without the circumstances being in evidence before me. It is not a dry point of law. It is a case of circumstances; in which a minute variation of circumstances may either incline the court to modify the relief or to grant no relief at all. The bankruptcy does not discharge the contract, but the case will be attended with considerable difficulties to the as-

commission of bankrupt, or by affidavit or affirmation exhibited to them, swear or depose, or, being of the peo-

signees at the hearing, but I cannot determine it upon a demurrer." *Brooke v. Hewitt*, 3 Ves. 253.

At the end of the report of *Brooke v. Hewitt*, 3 Ves. 253. it is added, "the Solicitor-General then said, that Lord Thurlow, under similar circumstances, executed such an agreement concerning a house on Ludgate Hill; and his lordship said, the bankruptcy was an assignment, and if the party had made an actual assignment, the assignee would without doubt be entitled to a performance, because the lease would be to him and his assigns. The only objection is, that the covenant of the bankrupt would undoubtedly be of less value: but the assignee ought to enter into all the covenants."

There seems to be no reason, why a court of equity should not decree a specific performance of a contract with a bankrupt in favour of the assignees, provided that they can do equity, whilst they seek equity, by performing, or securing the performance of, all that the bankrupt would have been required to do, if he had been solvent.

Upon the covenant of a trader not to assign a lease without the consent of the lessor, Lord Macclesfield held, upon reversing the decision of the master of the rolls, that upon the bankruptcy of the lessee, the authority of the statute superseded the private agreement of the parties, and that the assignment by the assignees, was no breach of the condition. *Goring v. Warner*, 2 Eq. Cas. Abr. 100. 1724. Lord Hardwicke acted conformably without hesitation. *Philpot v. Hoare*, 2 Atk. 219, Amb. 480. Lord Macclesfield's reason in referring to the authority of the statute is not intelligible, if he did not mean that such provisos do not extend to assignments, by operation of law; but the same construction I conceive would still be put upon such a proviso.

For where the lessee had covenanted not to let, assign, or otherwise to part with the indenture, with a proviso that the landlord might in such case re-enter, it was held that a sale of the lease under a *bonâ fide* execution, was not a forfeiture. *Doe v. Carter*, 8 T. R. 7.

And therefore bankruptcy would not have been a forfeiture.

But where there was an express proviso in a lease, that

ple called *Quakers*, affirm that any sum of money is due to him or her from any bankrupt or bankrupts, which sum

the landlord should re-enter on the tenant's being found a bankrupt under a commission, it was held that the assignment was void, and that the landlord might recover. *Roe v. Galliers*, 2 T. R. 133. 1787.

The court held there were no reasons of policy or principles of law, which could vacate such a proviso.

Where a lease was granted for twenty-one years, if the lessee, his executors and administrators, should continue to inhabit and dwell in the farm-house, and with a covenant not to underlet, &c. the lessee became bankrupt, it was held that the lessor might recover the premisses, that the lease was void when the lessee ceased to dwell in the farm-house from any cause whatever. *Doe v. Clarke and Brown*, 8 East, 185.

Where an annuity was given to a bankrupt for his life, charged upon real estates by will, in which the testator declared, that the receipt under the bond of the devisee, and no other, should be a sufficient discharge of the payment, and if it should be alienated, it should cease and determine. The court of King's Bench certified, that by the bankruptcy and bargain and sale it ceased and determined. *Domett v. Bedford*, 6 T. R. 684, 3 Ves. 150.

It seems to have been the intention of the testator, that the trader should enjoy the annuity, notwithstanding his bankruptcy. It is a great loss to the profession and the public, that the courts of law do not give reasons for their certificates.

Lord Kenyon and the court in this instance, probably thought that the law will not permit property to be given or granted to a trader, and the enjoyment of it secured to him after his bankruptcy,---that such a condition is repugnant to the principles and policy of the law, and therefore void.

The 13 *Eliz. c. 7. s. 2.* explains in the most general terms, what the commissioners can grant and convey in all lands, tenements, and hereditaments, viz. every interest which the bankrupt himself *may lawfully depart withal*; and the negative of the proposition is, I conceive, also universally true, that no interest will pass to the assignees, which the bankrupt could *not depart withal*.

These words in general are applied to every interest of

of money is not really due or owing, or shall swear or affirm, that more is due, than is really due or owing,

the bankrupt: to release may be to depart withal in hereditaments, but in every other instance, he must be able to assign to another.

All the cases in the books are only exemplifications of that general rule.

If an officer in the army and navy becomes a bankrupt, his full or half-pay will not pass to his assignees, because from principles of public policy, he cannot himself *depart* with it or assign it as a security for his debts. *Lauderdale v. Duke of Montrose*, 4 T. R. 248, 1 Bl. Com. 417. *Christian's notes*.

An advowson like any other hereditament may be conveyed by bargain and sale to the assignees; but if the living becomes vacant before the assignees sell it to a purchaser, it follows, from the principle laid down in *Charman v. Charman*, 14 Ves. 580, that in that case the bankrupt ought to present, because every interest results to the bankrupt, which is not convertible into money for the benefit of his creditors.

The statute of *Eliz.* declares that all *fees, annuities and offices* may be conveyed.

There is no word but those which can apply to the benefice of a clergyman who becomes a bankrupt.

It is now fully established that clergymen may be bankrupts, if they engage in trade. *Ex parte Meymot*, 1 Atk. 196. *Hankey v. Jones*, Cowp. 745.

Lord Hardwicke in *Ex parte Meymot* asks the question, "could the commissioners assign over his living? No; for the assignee must either have the whole or none: so that there can be nothing left for the performance of divine service in that case; which is, of itself, an argument, it was not the intention of the bankrupt acts to include spiritual persons; besides he may defeat such an assignment at any time, for he may resign, and is not obliged to keep a curate."

He then states the proceedings, how the living can be sequestered under a writ of execution, and adds "Here (that is in bankruptcy,) there can be no such provision."

Lord Hardwicke has therefore given us no information how the assignees are to recover the rents and profits of his benefice.

The chancellor seems to have no jurisdiction.

knowing the same to be due or owing, and that such oath or affirmation is false and untrue, and being thereof con-

If the bankrupt's consent cannot be obtained that the bishop should grant a sequestration of the benefice, the court of King's Bench (*ne deficiat justitia*) would perhaps grant a mandamus to the bishop to order a sequestration of the benefice, and that the rents and profits should be paid over to the assignees, as in the case of a *levari facias de bonis ecclesiasticis*.

Offices which concern the administration of justice cannot be sold by the 5 and 6 Ed. 6. c. 16. But all saleable offices may be assigned to the assignees.

The office of serjeant at mace to the corporation of the city of London was held by Lord Talbot not to be saleable, and therefore not assignable under bankruptcy. *Ex parte Butler*, 1 *Atk.* 210, 215. *Amb.* 73.

The place of a jew-broker in the city of London is not assignable. *Ex parte Lyons*, *Amb.* 89.

The office of one of the sworn clerks of the six clerks' office is not assignable. *Bristow's case*, 1 *Atk.* 212.

The offices of the under-marshal to the city of London and of gentleman pensioner, may be sold, as they do not concern the administration of justice. *Cooke*, 283.

The assignees may sell the office when it is saleable to the highest bidder, if he is qualified; and the chancellor would compel the bankrupt to resign. 1 *Atk.* 210.

All the wife's property over which by the marriage the husband has an absolute controul, passes absolutely by the assignment to the assignees; that is, all the rents and profits of her lauds, which he could have recovered in a court of law, will pass to the assignees during the joint lives of the husband and wife.

And if the husband is tenant by the curtesy, then for the life of the husband. But this interest for life must be conveyed by a bargain and sale enrolled. All debts due to the wife *dum sola*, and not recovered by the husband after marriage pass by the assignment. *Miles v. Williams*, 1 *P. Wms.* 249.

And if a wife before her marriage has a debt due to her by mortgage, it will pass absolutely by the assignment, unless the assignees are obliged to seek the aid of a court of equity, who will compel them to do the usual equity in making a suitable provision for the wife, if that was not done at the time of marriage. *Bosvil v. Brander*, 1 *P. Wms.* 459.

victed by indictment or information, such person shall suffer the pains and penalties inflicted by the several

“ A few years ago, an action was brought by assignees of the husband, against the Bank for stock that stood in the name of a married woman, and they recovered. The Bank permitted a defence to be made, and the question was whether the Bank holding the books was a trustee for the married woman? The court of law said, No. The Bank very rightly threw difficulties in the way of it.” Lord Loughborough in *Pringle v. Hodgson*, 3 Ves. 617.

But the difficulties or objections of the Bank cannot prevail against the assignment of the commissioners in a court of law, and the wife can have no assistance in equity.

This seems to have been decided in the last-mentioned case, and there is now no reason to doubt; though Lord Hardwicke in 1742, suggested a doubt whether the court of Chancery in favour of the wife, would not grant an injunction to stay execution, though he did not know any instance where the court before that time had interfered. *Jewson v. Moulson*, 2 Atk. 417.

But all property, real or personal, which is given to the wife for her sole and separate use, cannot be touched by the assignees of her husband, if he becomes a bankrupt. *Vandernanker v. Desborough*, 2 Vern. 96. 1689.

And where lands are left by will to a married woman, for her sole and separate use, and no trustee is appointed, the husband will be considered in equity as the trustee; and if he becomes bankrupt, no interest in the premises can be conveyed to his assignees. *Bennett v. Davis*, 2 P. Wms. 316. 1725.

The chancellor in that case decreed the assignee to join with the husband to convey to a trustee for the separate use of the wife.

So also under articles for a marriage settlement, Lord Hardwicke held that the wife was entitled to the same relief against the assignees as she would have had against her husband; and as the husband was only a trustee for the wife's separate use, the assignees of course must be trustees in the same manner. *Tyrrell v. Hope*, 2 Atk. 558. 1743.

It is a great question, when there is a debt due to the wife, *dum sola*, or which becomes due to her during the coverture, and which would survive to her in case her husband had died before he had reduced it into his pos-

statutes made and now in force against wilful perjury, and shall moreover be liable to pay double the sum so

session, if he becomes a bankrupt, and dies after assignment, but before the assignees have gained possession of the property, whether the right of survivorship still remains in the wife; or whether the assignment does vest the wife's property absolutely in the assignees, and cut off entirely the contingency of the survivorship of the wife?

Having observed an apparent difference of opinion in tracing the cases upon this point, and thinking that *Pringle v. Hodgson*, 3 Ves. 617, had been the last upon the subject, I sat down to draw up my reasons in support of that decision by Lord Rosslyn.

I was greatly surprized to find soon afterwards, that the point had been decided after much consideration by his honour, the present master of the rolls, in the case of *Mitford v. Mitford*, 9 Ves. 87.

The partiality for my own preconceived opinion, has probably prejudiced my mind from admitting, in this instance, the conviction which his judgments generally carry along with them. I shall therefore state the history of the subject, the reasons given by others, and those which have occurred to myself.

The first case I have found in which this subject is mentioned, is *Miles v. Williams et uxor*, 1 P. Wms. 248.

It was a case before Lord Macclesfield, when he was chief justice of the court of King's Bench. An action was brought against Williams and his wife, upon a bond given by her, when she was single. They pleaded that the husband had become bankrupt, and had obtained his certificate; to this there was a demurrer; and the question was whether such a debt could have been proved under the husband's commission, and was barred by the certificate.

The subject must have been much considered, for the report states that there were several arguments upon it.

Ch. J. Parker begins his learned argument, by stating "it was said, and (I think) admitted at the bar, that a debt due by the wife, and one due to the wife, *dum sola*, must fall under the same consideration."

He then considers largely the effect of the assignment upon the wife's choses in action, and he observes that "his

sworn or affirmed to be due or owing, as aforesaid, to be recovered and levied as other penalties and forfeitures

release for a consideration to himself alone, would have barred her of the contingency, and this is a release in law, and amounts to the same thing." 1 P. Wms. 255. 1714.

Now Ch. Justice Parker, though it was not the point to be decided, had fully considered it, and had thought it more clear and certain than the question before the court, viz. that the wife's debt was barred by the husband's certificate, because he makes it the basis of his judgment.

From what is clear and certain, we draw conclusions in cases which are obscure and uncertain.

The next case is *Bosvil v. Brander*, 1 P. Wms. 458. 1718. A *feme sole* is a mortgagee, in fee for 800*l.* and marries a tradesman, who becoming a bankrupt, a commission of bankruptcy is taken out against him, and the commissioners assign over all his estate, real and personal. Afterwards the husband dies, and the writings relating to this mortgage being in the hands of the assignees, the widow of the bankrupt files a bill in equity, against the assignees for these writings, and to have the benefit of the mortgage.

After two arguments, the master of the rolls, Sir Joseph Jekyll, delivered his opinion solemnly for the plaintiff the wife.

But afterwards he was dissatisfied with his decree, and was attended by counsel again. He then gave an elaborate judgment in favor of the assignees, and cited with approbation, what was said by Ch. J. Parker in *Miles v. Williams*. He said as this mortgage was not agreed to be settled upon the wife before marriage for her separate use, and there was a sufficient settlement upon the wife, she could have no relief by her bill.

This seems to be a solemn decision upon the very point after Sir Joseph Jekyll had renounced his former error: this was acquiesced in because Lord Macclesfield was then chancellor, who after much consideration had maintained the same doctrine.

Grey v. Kentish, 1 Atk. 280, 1749. This case is corrected by Mr. Cox in a note to the former case. 1 P. Wms. 458.

are upon penal statutes after conviction to be levied and recovered ; and such double sum shall be equally divided

In Atkyn's reports it is quite unintelligible. It appears, that Crispe the bankrupt had married the daughter of Elizabeth Kentish, upon whose death a legacy was to be paid to Crispe's wife. Crispe's assignment under the bankruptcy, and death took place before the death of Elizabeth Kentish, before the legacy become actually payable to his wife, or the assignees. Lord Hardwicke decided in favor of the wife, notwithstanding the opposition of the general assignees of Crispe. But no reason is given, and the whole appears to me to be inexplicable, though it is ranked as a judgment contrary to the former solemn judgments.

In *Gayer v. Williamson*, 1 Bro. 50, n.2 Dick. 492. 1773. All that is stated in 1 *Brown*, is, that the assignees insisted that the statutes of bankruptcy vested the husband's right in the assignees, as effectually as if it had been reduced into possession. The lord chancellor dismissed the bill. But it is not stated, what was Lord Bathurst's reason for dismissing the bill.

In *Pringle v. Hodgson*, 3 Ves. 617, 1798; this point of survivorship came expressly before the consideration of Lord Rosslyn, who expresses himself thus confidently : " The assignee at law has a right to the chose in action of the wife; and the law reduces it into possession. The bankrupt laws give over all that the husband had, or could dispose of to the assignee."

" The part of her property that remains (unrecovered by the husband) is vested by law in the assignees; and the question of survivorship is quite laid aside by the bankruptcy."

The following would have been the train of reasoning I should have pursued, if the case of *Mitford v. Mitford* had not existed.

It is merely a question of law, and courts of equity have no jurisdiction, but when some circumstance springs out of it, which brings the whole before their jurisdiction, or where the debt due to the wife may be a legacy, which is now subject solely to the cognizance of a court of equity.

But where it is a debt upon a bond, or promissory note to the wife, or upon any simple contract before the

among all the creditors seeking relief under the said commission. (29)

marriage of the wife, then a court of law must alone decide whether the wife or the assignees shall have these debts, if they do not recover them before the death of the husband. A court of law, I conceive, must decide in favour of the wife, if they do not find themselves bound by the express words of a statute; for the wife's survivorship depends upon the common law, and as the husband cannot assign any chose in action by the common law, a court of law must decide in favour of the wife, if some statute has not expressly enacted the contrary.

By the 13 *Eliz. c. 7, s. 2*. The commissioners had the power to grant and convey the bankrupt's debts; but doubts having arisen in what manner they were to be recovered, that is fully provided for by the next statute, 1 *Jac. 1. c. 15. s. 13*. It enacts that the commissioners shall have the power to grant and assign, &c. all the debts due, or to be due, *to or for the benefit of the said bankrupt, in whatmanner and form soever*; and after such grant or assignment, neither the bankrupt nor any other to whom such debt shall be due, shall have power to recover the same." The present statute uses only *estate and effects*, and directs that all those shall be assigned to the assignees here described.

A court of law must be guided by the words of the 1 *Jac.* only; and I should think it would determine that the words, *a debt due for the benefit of the bankrupt in whatever form*, which after assignment neither the bankrupt nor any other shall have power to recover, were studiously collected to comprehend every interest similar to that of the wife, and that they could bear no other construction.

If a court of law must put this construction upon the statute in the case of a bond given to the wife, *dum sola*, a court of equity must necessarily put the same construction upon the statute, in the case of a legacy given to the wife; for equity in the construction of statutes must follow the law; but still before the court of equity delivers out the property according to that construction, it may compel the assignees to make the same provision for the wife, as it would have obliged the husband to have done.

If the wife's right is not transferred by the statute to the assignees, then she can only be restrained from recovering after her husband's death, by a court of equity.

30. Provided always, and be it further enacted, That Commissioners it shall and may be lawful for the said commissioners, ^{may appoint assignees.}

With regard to the husband's assignment of the property of the wife, I conceive all the present law upon the subject is contained in the following sentence, expressed by Lord Hardwicke.

"The husband may assign the wife's chose in action, or a possibility that the wife is entitled to, as well as her term, so that it be not voluntary, but for a valuable consideration; but though he cannot dispose of her chose in action, without a valuable consideration, yet he may release the wife's bond without receiving any part of the money. *Bates v. Dandy*, 2 Atk. 207.

The principle in each of these three cases, I presume is this: equity will not assist a person, to whom the husband has made a present of the property of the wife, whom it was his duty to prefer. But if he sells that property which he had a right to recover, then the wife may have participated in the enjoyment of the equivalent, and may have had the whole or a part at her husband's death. The purchaser therefore has a better claim than the wife, and a court of equity will restrain the wife from recovering after the husband's death.

But where the possessor of the wife's property can at any time deliver it into the husband's hands, the release of the husband, even without payment, is a complete discharge; for if it had been paid, the husband might have given it back the next moment, and no court could have interfered.

But an assignment in bankruptcy with respect to the wife's contingency of survivorship ought to operate as an assignment for a valuable consideration, because by contracting the debts, the husband has had the full value of the property, and the wife has had a participation with him.

Besides if the assignment did not carry the wife's choses in action absolutely, upon the death of the wife, the husband must sue for them as her administrator; and the creditors of the wife *dum sola* must have a priority before the rest of the creditors, which would raise a degree of confusion, which the legislature, it is presumed, never intended.

authorized as aforesaid, or the major part of them, as often as they shall see cause, for the better preserving and

This is the way I had considered the subject before I was apprized that the question had been decided differently in the case of *Mitford v. Mitford*, 9 Ves. 87.

In that case Mrs. Mitford, the wife of the bankrupt, was entitled to 1000l. after the death or marriage of Charlotte Mitford. In 1784, Robert Mitford the husband became a bankrupt, and within the year obtained his certificate. In 1789, Charlotte Mitford married, when the legacy of 1000l. became due to the bankrupt's wife; in 1790, the husband died. The bill was filed by the trustee to have the claims of the assignees and the widow ascertained.

The question was merely whether the widow's right of survivorship prevailed against the assignees, who had not recovered possession before the death of the husband.

His honour, the master of the rolls, considered the former cases, and observed "where such authorities are opposed to each other, it is necessary to examine the principles on which the decision of the question depends.

"I have always understood the assignment from the commissioners, like any other assignment by operation of law, passed his rights precisely in the same plight and condition as he possessed them. Even where a complete legal title vests in them, and there is no notice of any equity affecting it, the assignees take, subject to whatever equity the bankrupt was liable to. This shews they are not considered purchasers for valuable consideration in the proper sense of the words.

"The court considers the assignment as doing nothing more than to place the assignees in the room of the husband.

"It seems to me that the decisions in favour of the wife's claim by survivorship are most consonant to acknowledged principles with regard to the operation of assignments under the bankrupt law.

"On the whole I am of opinion, both on principle and on authority, that Mrs. Mitford having survived her husband is intitled to the legacy.

The judgment of the master of the rolls, fills several pages; the selection of the above sentences must therefore give a very inadequate idea of it.

But still I am of opinion, that it is a pure question of law,

securing the bankrupt's estate, immediately to appoint one or more assignee or assignees of the estate and

which I hope to see some time determined, viz. if a bond is given to the wife, *dum sola*, and if her husband becomes bankrupt, and dies before his assignees have recovered the amount of the bond, whether it then survives to the wife, or it is to be recovered by the assignees: When that question is determined at law, courts of equity will easily determine how they shall model the legal right to answer all equitable purposes. Till that is ascertained by a court of law, courts of equity in my opinion are building upon an unstable foundation.

Lord Hardwicke states, in *Garforth v. Bradley*, 2 Ves. 677, that if a man marries, and in consideration of that marriage makes a settlement upon his wife by way of jointure, and in consideration of such portion as she is or may be entitled to, if any thing comes afterwards during the coverture to the wife, he is considered as a purchaser, and shall take it. If, on the other hand, the settlement on the wife is in consideration of her present portion or fortune, without reference to what comes afterwards, and the husband does not reduce it into possession, it will survive to the wife in equity, as well as by the rule of law. This was cited by the master of the rolls with approbation. 9 Ves. 96.

And if there is not a settlement in consideration of her future fortune, then whatever the assignees cannot recover without the assistance of a court of equity, they must make a proposal for a settlement to be approved by a master in chancery. If it is a legacy they generally take one half, and one half is settled upon the bankrupt's wife.

Wherever the assignees of the husband are obliged to sue in a court of equity for a legacy or any other property due to the wife, they must do the same equity as the bankrupt would have been compelled to do, viz. to make a proper settlement or provision for the wife and children if such a settlement was not made at the time of the marriage. *Jacobson v. Williamson*, 1 P. Wms. 382.

See Mr. Cox's note to *Borvil v. Brander*, 1 P. Wms. 458, who from a general review of the cases concludes that "where the property is a subject of equitable cognizance, it is clear that the general assignees of the husband

effects, or any part thereof; which assignee or assignees, or any of them, shall or may be removed or displaced

(whether by operation of law or otherwise) are subject to the same equity with the husband himself; and it does not seem material whether the wife or the husband, or his representatives, or general assignees come for the aid of the court."

Lord Hardwicke has said, if the wife's debtor will pay her debt to the husband, I do not know that this court has ever interfered. *Jewson v. Moulson*, 2 *Atk.* 417. 1742.

Lord Eldon has said the same. "The husband where he can, is entitled to lay hold of his wife's property, and this court will not interfere. Previously to a bill filed a trustee, who has the wife's property real or personal, may pay the rents and profits, and may hand over the personal estate to the husband." *Murray v. Elbank*, 10 *Ves.* 90.

But if an executor should pay to the assignees a legacy left to the bankrupt's wife, or any other debtor to her should pay them the debt, I am inclined to think, upon a petition of the wife, before all the effects were distributed, the chancellor would order the assignees to make the same provision for the wife, as he would have done upon a bill filed by her or the executor; for the property is still under the immediate control of the chancellor.

Lord Hardwicke said, that "it was held in two cases before Lord Chancellor Cowper, that the assignees of a bankrupt should make a provision for his wife out of her property; and I was also clearly of the same opinion in the case of *Jewson v. Moulson*, 1742. 2 *Atk.* 47.

"But I can find no case where the court have done it in the case of assignees of a bankrupt after the death of the bankrupt's wife." *Hearle v. Greenbank*, 3 *Atk.* 717. 1749.

In *Scriven v. Tapley*, *Amb.* 509, 1765, the master of the rolls had decreed the husband should make a settlement upon the children after the death of the wife; but upon an appeal to Lord Northington, he reversed the decree, observing that "it was personal to the woman. If carried further it would be attended with ill consequences to creditors."

The remainder, contingent interest, or possibility of the wife will pass by the assignment of the husband, just as if they were his own.

at the meeting of the creditors, so to be appointed as aforesaid, for the choice of assignees, if they or the major

Lord Hardwicke has said " that there is a particular train in the report of *Jacobson v. Williams*, 1 P. Wms. 382. and looks as if Lord Cowper rested his opinion chiefly upon the commissioners of bankrupts assigning a possibility which he thought they could not do; but he was certainly wrong in point of law, for that not only the latter statutes relating to bankrupts, mention the word possibility, but also because the 13 Eliz. c. 7. sect. 2. empowers the commissioners to assign all that the bankrupt might depart with.

" See *Higden v. Williamson*, 3 P. Wms. 132. And in equity it is well known that a possibility may be both released and assigned." *Jewson v. Moulson*, 2 Atk. 417. 1742.

That such an interest was assignable, was held by Lord Thurlow in *Worral v. Murlar*, 1 P. Wms. 459, note; 1784.

In *Mitford v. Mitford*, p. 265, ante, it was never doubted.

The effect and operation of the assignment of the bankrupt's property abroad is a subject of great importance, and I shall consider it as nearly as I am able according to its historical arrangement.

The 13 Eliz. c. 7. s. 2, gives the commissioners power to convey all the bankrupt's lands, goods, debts, &c. wheresoever they may be found or known.

The 1 Jac. c. 15. c. 13 enacts, that after the assignment of a debt to the bankrupt, the same shall not be attached by any other person according to the custom of the city of London or otherwise.

A creditor before the bankruptcy went into Scotland to sue for the bankrupt's property but did not obtain sentence till after the bankruptcy. Lord Hardwicke said, " it is like a foreign attachment, by which this court will not suffer a creditor to gain priority, if no sentence were pronounced before the bankruptcy." And he granted a ne exeat regno till he found security to abide the event of the cause. *Mackintosh v. Ogilvie*, cited 4 T. R. 193. 1748.

" Lord Mansfield at the cockpit said, the bankrupt

part in value of them (whose debts respectively amount to ten pounds or upwards, as aforesaid) then present, and

statutes do not extend to colonies or any of the king of England's dominions out of England; but the assignments are considered as voluntary, and take place between the assignee and the bankrupt, but do not affect the rights of any other creditors: and that Lord Hardwicke had said that creditors had a right to affect the bankrupt's estate in Scotland, notwithstanding the commission in England; but if after that they should offer to come in under the commission, they should have no benefit from it, till the other creditors were made even with them." *Cleve v. Mills, Cooke* 297. 1764.

But it appears that in Ireland the courts will give effect to an assignment under the English bankrupt law; for where a creditor of a bankrupt in England had attached debts due to the bankrupt in Ireland, and had received them under a writ of execution after the bankruptcy in England, Lord Chancellor Lifford upon a bill filed by the assignees, called in the assistance of several of the judges, and after great consideration, with their approbation pronounced a decree in favour of the plaintiffs, the assignees, and ordered the money to be paid over to them. *Neave v. Nottingham*, 1 *Hen. Bl.* 132. 1766.

How the English courts of law take notice of the bankrupt laws of other countries, Lord Loughborough has well explained in the following words.

"The determinations of the courts of this country have been uniform to admit the title of foreign assignees. In the two cases of *Solomons v. Ross*, (before Lord Bathurst) and *Tollet v. Deponthieu* (before Lord Camden) where the laws of Holland having, in like manner as a commission of bankrupt here, taken the administration of the property, and vested it in persons who are called curators of desolate estates, the court of chancery held that they had, immediately on their appointment, a title to the debts due to the insolvent in this country, in preference to the diligence of the particular creditor seeking to attach those debts;" in *Sill v. Horswick*, 1 *Hen. Bl.* 665.

In the same case Lord Loughborough has also stated

of such persons duly authorized, as aforesaid, shall think fit; and such assignee or assignees, as shall be so removed

the operation of our bankrupt law in Scotland to be as follows.

“ By the law of Scotland debts are assignable, and an assignment of the debt notified to the debtor, which is technically called an *intimation*, makes a specific lien quoad that debt. An assignment of a debt not intimated to the debtor, gives a right to the assignee to demand that debt; but it is a right inferior to that of the creditor, who has obtained his assignment and intimated it. By the law of Scotland also, there is a process for the recovery of debts, which is called an arrestment. In Wilson's case the determination of Lord Hardwicke and that of the court of session entirely concurred.

“ The first class were holden by Lord Hardwicke to stand in the same situation as creditors claiming by mortgage, antecedent to the bankruptcy. With respect to the second class Lord Hardwicke and the court of session were of opinion, that their title being a title by assignment was preferable to the title by arrestment: and they likewise held, that the arrestments being subsequent to the bankruptcy were of no avail, the property being by assignment vested in the assignees under the commission.”
Ibid.

If a debtor abroad, as at St. Christopher's, to a bankrupt in England is compelled to pay the debt by an attachment to a creditor of the bankrupt, if he comes to England, he cannot be compelled to pay it again to the assignees.

Lord Mansfield observed, “ if after the bankruptcy and before payment to the assignees, money owing to the bankrupt out of England is attached, *bonâ fide*, by regular process according to the law of the place, the assignees in such case cannot recover the debt. *Le Chevalier v. Lynch*, Doug. 161. 1779.

That is they cannot recover the debt against the debtor of the bankrupt, who has so *bonâ fide* paid it to a creditor of the bankrupt.

The same was decided by the lords commissioners of the great seal. *Maudesley v. Parke*, 1 Hen. Bl. 680. 1779.

It has been determined by the court of King's Bench,

and displaced, shall deliver up and assign all the estate and effects of such bankrupt, which shall have come to

in the case of *Hunter v. Potts*, 4 T. R. 182. 1791. And in the same year in the case of *Sill v. Worswick*, 1 Hen. Bl. 665, that if a creditor of a bankrupt in England, who became such creditor in England, has recovered a debt due to the bankrupt in a foreign country, by process of attachment in that country, he is not entitled to retain the money so recovered to his own use, but that he may be compelled to pay it over to the assignees on an action of assumpsit, as so much money had and received to their use. The judgment of the court of King's Bench was affirmed, in the Exchequer chamber by all the judges, Ch. J. Eyre alone dissenting.

The courts seemed to have proceeded upon the simple principle that every creditor of the bankrupt resident in England at the time of the bankruptcy, who becomes possessed of the bankrupt's property, after that time shall be compellable to restore or repay it to the assignees. Ch. J. Eyre made a most elaborate argument, but his reasons to my mind are not convincing.

In these cases the creditor who obtained payment was resident in England.

It was admitted that if a foreigner had obtained payment of his debt by the law of the country where the debtor's property was situated, if he came to England, the assignees could have no remedy against him.

But if a British subject resident upon the spot, should avail himself of the law of the country, to procure payment of his debt, if he should come afterwards to England, as he was always bound by the laws of his country, I should presume that he would be subject to the same action by the assignees, as if he had been constantly resident here.

If a foreigner attaches the bankrupt's property abroad, he shall not be permitted to prove a debt under the commission till he gives up the property. *Ex parte Smith*, Cooke 308. 1791.

Lord Eldon has said that a creditor in England, and subject to the bankrupt laws, having attached the bankrupt's estate abroad, must restore it. 9 Ves. 80.

Where property was attached in Jersey, according to

his or their hands or possession, or which shall have been assigned by the said commissioners, as aforesaid, unto

the law of the country, Lord Eldon held that if the judicial act was complete even on the same day before the act of bankruptcy, the creditor had a right to the full benefit of the attachments; but if the act of bankruptcy was previous to the completion of the judicial act, then the creditor could not claim it against the assignees. *Ex parte D'Obree*, 8 Ves. 82.

It is an important question; whether there is any mode of compelling a bankrupt to execute an instrument, by which the assignees can obtain the bankrupt's real or personal property in a country, the courts of which do not recognise the bargain and sale, or the assignment of the commissioners as a legal transfer of it.

The chancellor has no authority to compel him directly by the bankrupt statutes. He can only influence by the disallowance of his certificate. In the case of an assignment of a chose in action for the payment of debts, a court of equity will compel the debtor to permit his name to be used in a court of law: so for the attainment of the same equitable purpose in bankruptcy, I should be inclined to think that a court of equity could assist the assignees by compelling the bankrupt to execute a proper instrument, or to permit them to use his name for the recovery of the property abroad.

But I speak with diffidence, as this great question remains yet to be considered and decided by the courts of equity.

(27) The following is a short history of the appointment, or election of an assignee.

By the 1 Jac. 1, c. 15, s. 13, the commissioners had power to assign a debt, so that the assignee could bring an action in his own name.

Before the 4 and 5 Ann. c. 17, it had become the practice to assign several, or all the debts, to one person in trust for himself, and the rest of the creditors. It appears that the creditors had been in some degree consulted in this appointment; for Serjeant Goodinge gives the precedent of a bond given by the assignee, to the principal creditor in a large penalty, conditioned for the faithful discharge of his office.

such other assignee or assignees, who shall be chosen by the creditors, as aforesaid; and all the estate and effects

The 11th section gives to the *assignee* or *assignees* of the *commission*, that is, to the person appointed by the commissioners authority to balance the accounts. By the 5 *Ann. c. 22, s. 4*, the assignee or assignees shall be chosen by the major part of the creditors, then present.

No respect is paid to the amount of their debts.

By the 5 *Geo. 1, c. 24, s. 21, 22*, the election shall be by the number of creditors; but no one shall vote whose debt does not amount to 10*l*.

Here the qualification to vote is continued; but by the preceding section, the election shall be made by the major part in value of the creditors: so that one creditor, whose debt amounts to 10*l*. will outvote five creditors, whose debts are 20*l*. each.

(26) This short section comprehends an extensive branch of the bankrupt system. The decisions immediately referring to it, and those founded upon the ancient statutes, are so full of inconsistency and confusion, that it will be necessary to consider the whole subject chronologically; by which method I trust I shall convince every professional reader that several great errors under this head of law have arisen, merely from an ignorance of the history of the balance of accounts in bankruptcy, which existed in the first origin of the bankrupt law, and by confounding it with the set-off in actions, which first commenced by the 2 *Geo. 2, c. 13*, with which the balance of debts in bankruptcy had no connection, and to which the legislature, by this statute, the 5 *Geo. 2*, never intended to make any reference.

The expired statutes will appear to have been worth preserving, even for the light they throw upon this subject; and from them it will be proved incontestably, that the coincidence in the balance of debts, in bankruptcy, and the set-off in actions is merely accidental; and that the balance in bankruptcy is far more extensive, and not restricted by any forms of pleading.

But I shall proceed to the consideration of the statutes, and the construction which has been put upon them.

of the bankrupt, which shall be delivered up or assigned, shall be to all intents and purposes as effectually and

By the 13 *Eliz.* every creditor was to receive a portion, rate and rate alike according to the *quantity of his debt*.

The quantity of his debt, it will appear was the balance due to him.

By the 1 *Jac.* 1, c. 15, s. 13, the commissioners might assign a debt, so that the assignee might sue in his own name.

The amount of the debt assigned, was particularly specified in the deed of assignment, and when it became a practice to assign several, or all the debts to one person in trust for the rest of the creditors, all the debts assigned were particularly specified in a schedule annexed to the assignment. They had of course been all balanced and settled previously, by the commissioners.

That this was the practice, before the 5 *Ann.* c. 17, appears from the following authority cited by *Serjeant Goodinge*, p. 190, 2d *Ed.*

Per North, Chief Justice. "If there are accounts between two merchants, and one of them becomes bankrupt, the course is not to make the other, who perhaps upon stating the accounts is found indebted to the bankrupt, to pay the whole that was originally intrusted to him, and to put him for the recovery of what the bankrupt owes him into the same condition, with the rest of the creditors, but to make him pay that only, which appears due to the bankrupt on the foot of the account: otherwise it will be for accounts betwixt them, after the time of the others becoming bankrupts, if any such were." *Anon.* 1 *Mod.* 215. 1675.

The same was held by Lord Hale.

"In the case of a bankrupt, adjudged by the Lord Chief Justice Hale, that where there were dealings on account, that a man should not be charged with the account on the credit side, and be put to come in as a creditor for the debt owing to himself; but should only answer to the bankrupt's estate, the balance of the account." *Chapman v. Derby*, 2 *Vern.* 117. 1689.

It is worthy of observation, that these were judgments in a court of law.

legally vested in such new assignee or assignees, as if the first assignment had been made to him or them by the

It now remains to be proved, that neither the expired statutes nor this section have made any difference whatever in the subject; and the balance of accounts, or reciprocal demands between the bankrupt and any of his creditors still depend upon the original statute 13 *Eliz.*

The 4 and 5 *Ann. c. 17, s. 11*, first mentions the balance and adjustment of the accounts between the bankrupt and his debtor.

It gives the commissioners no more power than they had originally; but it was necessary to introduce the subject, because it gives the assignee, appointed by the commissioners, the power also independently of the commissioners. See *p. 67, ante*.

The 5 *Ann. c. 22, s. 4*, introduced assignees chosen by the creditors.

The 5 *Geo. 1. c. 11*, repeats the 4 and 5 *Ann. c. 17, s. 11*, in nearly the same words, except that it omits the words *assignee or assignees*; so that the commissioners alone have power of balancing the accounts, and that balance alone is to be recovered. See *p. 93*.

This section of 5 *Geo. 2. c. 30*, introduces again the assignees with the commissioners.

The assignees have a power of balancing the account with the debtor of the bankrupt, which they had not prior to the statute of *Queen Ann*; but the commissioners have no more authority given them, than they had at their first creation, and they were only named; that it might not be thought that the assignees possessed a power, which the commissioners had not.

In pursuing the authority of the commissioners upon this subject, it will appear incontrovertibly that this section, in which accounts between the bankrupt and his creditors or debtors are to be balanced, has not the slightest connection with the statute of set-off in actions passed three years before the 2 *Geo. 2. c. 22, s. 13*. That statute provides that, where there are mutual debts between the plaintiff and defendant, or if either party sue or be sued as executor or administrator, where there are mutual debts between the testator or intestate, and either party, one debt may be set against the other, and

said commissioners; and if such first assignee or assignees shall refuse or neglect, by the space of ten days next

such matter may be pleaded in bar, or if the general issue is pleaded, notice shall be given of the particular sum or debt so intended to be insisted upon, &c.

The statute carries with it internal evidence that it did not apply to bankruptcy; for if the legislature had intended it, they would have had the same reason to mention the assignees of bankrupt, as executors and administrators. But they had no occasion to mention assignees of bankrupt, as they had the power by the aid of the commissioners to have all the effect of this statute, by the 5 Geo. 1. c. 17. s. 11.

If this section has no reference to the statute of set-off; then the debtor of the bankrupt can have the benefit of the balance of his account, with the bankrupt without a special plea, or giving notice of set-off.

I now proceed to the consideration of the decided cases, since the time of *Queen Ann.*

The first is *Lord Lanesborough v. Jones*, 1 P. Wms. 1716. "Coggs, the bankrupt, owed Jones 1400*l.* by notes, Jones owed Coggs 1500*l.* upon a mortgage." A bill was filed by the assignees to compel Jones to pay 1500*l.* the debt he owed upon the mortgage; insisting he should come under the commission for a dividend upon the notes.

"But it was decreed by Lord Chancellor Cowper, with great clearness, that in regard, by the late statute of 4 Ann. c. 17, s. 11, it is enacted, that where there is a mutual credit between a bankrupt and another, only the balance shall be paid. So in this case, here was a plain mutual credit, viz. Coggs gave credit to Jones on the mortgage, and Jones gave credit to Coggs on his notes; and therefore the balance only should be paid: and this clause in the statute was not to be construed of dealings in trade only, or in case of mutual accounts; but that it was natural justice and equity, that in all cases of mutual credit only the balance should be paid."

This is a most important decision. Debts of any denomination might have been balanced against each other in bankruptcy, long before the statute of set-off existed; and though there is a reference to the statute of *Queen Ann.*, then in existence, yet the decree must have

after notice given of the said choice of such new assignee or assignees, and of his and their consent to accept such

been the same, though that statute had never been passed.

Sir Stephen Evance was banker to the Hudson's Bay company, and was greatly indebted to them and became bankrupt; the company held stock of his, and there was a bye-law of the company that the stock of each member should be liable to satisfy his debts: the assignee of the bankrupt brought a bill against the company to oblige them to suffer him to transfer the stock. But the chancellor, assisted by Raymond, C. J. and Mr. Justice Price, held that this was within the clause in the bankrupt act, (5 Geo. 1. c. 24. s. 11) which directs the commissioners to state the account between mutual dealers, and that they shall be allowed to account only for the balance. *Gibson v. Hudson's Bay Company*, 1 Str. 645. 1725. This shews the same construction was put upon the 5 Geo. 1. as upon the 4 Ann.

Where there are mutual demands between a creditor and a bankrupt under the clause in 5 Geo. 2. c. 30. s. 28, in which are these words, "no more shall be claimed and paid than appears to be due on either side, upon a balance of accounts stated." The master of the rolls was of opinion, that upon an action at law the defendant might set off his demand against the plaintiff, as is done in other cases by virtue of the statute of 2 Geo. 2. c. 22. s. 13. and 8 Geo. 11. c. 24. s. 6, and that there is no occasion to come into a court of equity to pray an injunction to a suit at law, and that the plaintiff at law may account. *Lock v. Bennet*, 2 Atk. 1740.

The master of the rolls, from what he has said here it is clear was not acquainted with the history of the subject.

An action was brought by the assignees of Harvest, a surviving partner for a debt due to the partnership; the defendant pleaded a set off, that the bankrupt was indebted in a greater sum to him; upon this there was a general demurrer. For the plaintiff, it was insisted that the act of parliament for setting off one debt against another, did not extend to assignees under a commission of bankrupt, and that in the present case there were not mutual debts; for wherever there are mutual debts there

assignment, signified to the first assignee or assignees, by writing under his or their hand or hands, to make such

must be mutual remedies, and the defendant could have no action on his bond against the plaintiffs: and of this opinion was the court, and gave judgment for the plaintiff. *Ryall v. Larkin*, 1 *Wils.* 155. 1746.

The court seem to have adopted only the argument of the counsel with regard to the statute of set off; the balance of accounts in bankruptcy is never mentioned.

But this must have been considered as law till the case of *Ridout v. Brough, Corp.* 133. 1774. It was an action of assumpsit by the assignees of a bankrupt, to which there was a plea of set-off, and a demurrer; and it is said that Lord Mansfield and the court were clearly of opinion that the defendant might set off a debt due to him from the bankrupt; for the assignees are the bankrupt, and seemed to impeach the decision in 1 *Wils.* 155, "that the statutes of set-off do not extend to assignees under a commission of bankruptcy as against the general principles of law, justice and good sense."

If the history of the subject had been presented to the minds of the court, it cannot be doubted but they must have been of the same opinion with the court of common pleas. They thought the 5 *Geo. 2.*, merely from the dates must necessarily have referred to the 2 *Geo. 2.*, with which I trust I have proved it has no connection.

In an action against a broker who had a del credere commission for money due to the bankrupt, he pleaded the general issue, with notice of set-off for money had and received by the assignees for his use.

Lord Mansfield and the court were clear that the debt which the defendant claimed from the bankrupt might be set off by him as broker.

But Mr. J. Buller added "I agree that the notice of set off is bad" (meaning that particular notice); "but this loss may be proved and set off under the general issue of the 28th section of the 5 *Geo. 2. c. 30.*" He then recites the section; "therefore we see by this section of the statute that the assignees could legally claim no more than the balance upon the account between the parties." *Grove v. Dubois*, 1 *T. R.* 112. 1786.

assignment and delivery, as aforesaid, every such first assignee or assignees shall respectively forfeit the sum of

Though in all the subsequent cases of actions by assignees, which have been brought before the courts of law, it appears that the set-off was pleaded, or notice was given according to the statute of set-off, 2 Geo. 2; yet I have been assured that some experienced special pleaders, confiding in the authority of Mr. J. Buller, have ceased to plead a set-off to an action by assignees, but rely upon having the full benefit of it under the general issue.

If this point should ever be reconsidered by any court, I trust it will agree with me that the judgment in the case of *Ridout v. Brough*, Cowp. 133. was founded in an error, and an ignorance of the progress of the law; and that the opinion, "that the statutes of set off do not extend to assignees under a commission of bankruptcy, is not (as there represented) against the general principles of law, justice, and good sense."

Before I leave this subject I think it right to take notice that Lord Hardwicke was not acquainted with the construction put upon the ancient statutes, when he says, "Before the making of this act, if a person was a creditor, he was obliged to prove his debt under the commission, and receive perhaps a dividend only of 2s. 6d. in the pound, from the bankrupt's estate, and at the same time pay the whole to the assignees of what he owed to the bankrupt: to remedy this very great inconvenience and hardship the act was made."

Lord Hardwicke advanced this in a most important case, which has ever since been respected as a leading authority, viz. that if a bankrupt is a debtor at the time of his bankruptcy to a party, who is a debtor to the bankrupt by a bond given before the bankruptcy, but payable at a future time, as three years after the bankruptcy, these two debts may be balanced.

These are mutual debts and credits under the statute. *Ex parte Prescott*, 1 Atk. 230. 1753.

This is a debitum in presenti, solvendum in futuro; and when the assignees call for payment, the debtor may justly say the bankrupt received so much of my money and goods, which must now to that amount be considered as payment of my debt to him.

two hundred pounds, to be divided and distributed amongst the creditors, towards satisfaction of their debts,

In that case the debtor *agreed* to pay the difference immediately, having petitioned the chancellor to be permitted to set off one debt against the other upon a fair estimate; which was referred to the commissioners to calculate.

But the debtor could not be compelled to pay the difference till it is due: if, therefore, the assignees wished to make a final dividend before that time, the commissioners might compel the debtor to come before them, and state exactly upon his oath what demands he had upon the bankrupt, and the balance might be sold or assigned by the assignees to the highest bidder.

A factor or broker with a *del credere* commission may set off against his own debt to the bankrupt, a debt due from the bankrupt to his principal, from whom he has such *del credere* commission.

In the case of *Grove v. Dubois*, 1 T. R. 112. referred to before, the bankrupt John Liotard was an underwriter, subscribed policies filled up with the defendant's name for his foreign correspondents, who were unknown to the bankrupt: losses happened on the policies before the bankruptcy of Liotard, and the defendant had paid the amount of the losses to his foreign correspondents after the bankruptcy.

Lord Mansfield, C. J. "The whole turns on the nature of a commission *del credere*. Then what is it? It is an absolute engagement to the *principal* from the broker, and makes him liable in the first instance. There is no occasion for the principal to communicate with the under writer, though the law allows the principal, for his benefit, to resort to him as a collateral security. But the broker is liable at all events."

"He may therefore set off against any claim the bankrupt has against him personally a debt, which the bankrupt owes to any of his principals from whom he has such a commission arising in a transaction with the factor or broker."

As far as I can understand a *del credere* commission, it is an authority from the principal to a factor, broker, or agent to conceal his name, and to act as if he were acting for himself, and to be responsible to the principal for the event of the sale or contract he is authorized to make.

in such manner as the estate of the bankrupt is or ought to be divided and distributed, and to be recovered by

And in a similar case soon afterwards, where a broker had a *del credere* commission from his correspondents, and kept the policies in his hands.

The broker had paid to the bankrupt's assignees a debt he had owed the bankrupt, and the broker had paid his correspondents, from whom he had such *del credere* commission, 600*l.* for losses, which the bankrupt was liable to pay, and which he, the broker, had proved under his commission; but finding before the dividend was made, that he might have retained this as part of the sum he had paid the assignees, he brought an action of assumpsit to recover it back.

Lord Mansfield and the court were clearly of opinion that this might be recovered back as money paid by mistake.

The circumstance of the broker's having paid the amount of the loss to his correspondents, seemed to be immaterial: his liability would have given him, in my opinion, the same right to set off.

So the underwriter would have a clear right to set off such losses, if the broker with a *del credere* commission became a bankrupt, against any debt which such broker owed him personally.

But where payment has not been made by a purchaser to a factor with a *del credere* commission, the principal may maintain the action. *Scrimshire v. Alderton*, 2 Str. 1182.

If the action is brought by the principal to recover the value of the goods sold by such a factor, the purchaser may set off in this action by the principal a debt due to him from the factor, as if the action had been brought by the factor.

Lord Kenyon and the court of King's Bench held that this might be done both upon principle and upon a former authority. *Rabone v. Williams* cited in the report. *George v. Clagett*, 7 T. R. 359.

The principle must be the statute of set off, 2 Geo. 2. c. 13: but there the debts must exist between the plaintiff and defendant, and this seems to be a *casus omissus* by that act. It is highly equitable that the property which the factor obtained from the purchaser, should be consi-

action of debt, bill, plaint, or information, in any of his majesty's courts of record at *Westminster*, by such person

dered as payment; but it should seem that the statute of set off could not administer the relief: and in such a case the jurisdiction belongs exclusively to a court of equity.

But where the broker has no *del credere* commission, the broker, it has been held, cannot set off losses upon the insurances effected, for these losses belong to his correspondents. *Wilson v. Watson*, 1 *Esp.* 274. *Wilson v. Creighton*, 1 *T. R.* 113. There may be a difference between a broker and a factor: the underwriter never supposes that the property insured belongs to the broker; but a purchaser, if the factor conceals his principal, has every reason to conclude the property is his own.

If a purchaser has not paid a factor with a *del credere* commission before his bankruptcy, if he should pay that afterwards to the bankrupt's assignees, the chancellor upon petition will order the assignees to pay it over to the principal. *Ex parte Murray*, *Cooke* 379. 1783.

If a debtor to a bankrupt has a note or bill drawn or accepted by the bankrupt, indorsed to him after the bankruptcy, though he may prove this note or bill under the commission, yet he cannot balance it against the debt he owes the bankrupt's estate. If this could be done, great frauds would be committed; for every debtor to the bankrupt would buy up his notes or bills, and they would thus receive twenty shillings for each pound, though they might purchase them at a comparatively low price. *Marsh v. Chambers*, 2 *Str.* 1234.

And to prevent such frauds still more effectually, notes payable to bearer, drawn by the bankrupt, cannot be balanced in a court of law against a debt due to the bankrupt, unless the holder actually proves that he was possessed of them at the time of the bankruptcy. *Dickson v. Evans*, 6 *T. R.* 57.

This decision is in the case of bills payable to bearer; but the principle extends to every negotiable security claimed to be set off in a court of law, or before the chancellor or the commissioners.

So, upon the same principle, though the case in that instance may be sometimes hard, if the indorser of a note or bill, drawn or accepted, and indorsed before the bankruptcy, is obliged to take it back afterwards, he cannot balance it against a debt due by him to the bankrupt. *Ex parte Hall*, 3 *Ves.* 304.

or persons, as such major part of the commissioners, authorized as aforesaid, shall appoint to sue for the same,

If the bankrupt before his bankruptcy sell goods and draws upon the purchaser a bill of exchange, who accepts it before the bankruptcy, but pays it afterwards, this is a good cause of set off or balance against the claim of the assignees for the price of the goods. *Smith v. Hodson*, 4 T. R. 211.

Liability to pay, by drawing a note or accepting a bill, is considered payment at the time, if the note or bill is afterwards paid when due. If therefore notes are given to a person who becomes bankrupt before they are due, they may be balanced against a debt due to the bankrupt. *Ex parte Boyle, Cooke* 561.

But a debt due from the bankrupt cannot be set off against a demand by the assignees, if such debt has been contracted by the bankrupt after a secret act of bankruptcy; but this now may be set off if such credit was given to the bankrupt two calendar months before the date of the commission. 49 Geo. 3. c. 135. s. 3.

Where a person received a bill of exchange for a parcel of goods, but for a sum greater than the price of the goods, and promised to pay the excess immediately when he received payment, which he neglected to do till the party became bankrupt, he was permitted to set it off against another debt contracted by the bankrupt. *Atkinson v. Elliott*, 7 T. R. 378.

All debts which can be proved under the commission may be set off or balanced against demands made by the assignees.

Contingent debts which cannot be proved under the commission cannot be set off. See ante, 114.

But they may be proved and set off if secured by the penalty of a bond, which is forfeited before the bankruptcy. *Lord Kenyon* in *Hancock v. Entwistle*, 3 T. R. 435.

In that case the court held that an agreement to pay a certain sum of money, 1,900l., for liquidated damages in a claim against the bankrupt, if he did not, within four years, benefit the party to the extent of that sum by the recommendation of the purchase of cottons, could not have been proved under the commission; and that the bankrupt was not discharged by his certificate from the

with full costs of suit, wherein no privilege, protection, or wager in law, or more than one imparlance shall be

covenants, and therefore this sum could not be set off: *Ibid.*

The judgment of the court in that case seems to be correct; because the bankruptcy did not in any degree affect the bankrupt's ability to discharge the debt in the mode proposed: and whether any or what part would remain at the end of four years was quite uncertain.

But where there is a debt before bankruptcy to the bankrupt, though not liquidated or ascertained with respect to the amount till afterwards, it must be balanced when ascertained with a debt due from the bankrupt.

Fen, before Cox's bankruptcy, agreed that he should have the third share of the profits of the purchase of a row of pearls; the bankrupt's share of the profit upon the sale subsequent to his bankruptcy, was near 2000*l.* which the assignees of the bankrupt brought an action of assumpsit to recover. Fen gave notice of set-off that the bankrupt was indebted to him in a certain sum, which he was entitled to retain: Lord Mansfield and the court held that this was a case of mutual credit or debt within this section. *French v. Fenn, Cooke, 554.*

A distinction was made in that case, and seems to have been made in others, between a mutual credit and a mutual debt.

But if credit and debt are correlative terms, and if one cannot exist without the other, I do not see how it is material whether we call it one or the other. In the two expired statutes the words *mutual credit* are used alone. See p. 67 and 98 ante; and to remove all doubts whether these words did not mean a mutual debt, both words are used in this section.

Where there is debt on one side, as in this case of Fenn to Cox, he is inclined to give credit to the other party by letting him have money or goods, because he is able to secure himself: by retaining so much of it is in fact payment *pro tanto*; and without the existence of the first debt, credit would not have been given, or the second debt would not have been contracted.

Though this may sometimes be the inducement to give

allowed: any law, custom or usage to the contrary notwithstanding. (30). (See post, p. 302 for this note.)

credit, yet it is quite immaterial with regard to the legal effect; as where a trader has accepted a bill payable at a future day, which bill is indorsed to a party, who purchases of the trader goods to the amount of the bill, without communicating to him that he is in possession of the bill; if the trader becomes bankrupt, this bill may be set off against the amount of the value of the goods. In that case, Mr. J. Buller said, "in order to constitute mutual credit, it is not necessary that the parties mean particularly to trust each other in that transaction." *Hankey v. Smith*, 3 T. R. 507.

The holder of the bill was induced to go to the trader to buy; but perhaps at that time he was the last person the trader would have wished to have given credit to.

If an insurance broker has a policy put into his hands by his principal to receive the amount of a loss from the underwriters; if the principal afterwards becomes a bankrupt, though the loss was adjusted afterwards, and the amount received afterwards, he may set-off what he receives against any debt due from the bankrupt to him; for this was a debt which he was authorized to receive before the bankruptcy, the amount only was ascertained afterwards. *Whitehead v. Vaughan*, 25 Geo. 3. B. R. Cooke, 566.

The court of Common Pleas also decided that policy-brokers and general agents of a bankrupt have a right to retain the whole sum received from the underwriters towards payment of the balance due to them, and not merely for the charge of the particular insurance. *Parker v. Carter*, 1788. Cooke, 567.

The law of liens forms a distinct head from that of set-off or mutual debts.

A lien is a defence in an action of trover; the set-off or balance can only be claimed in an action of debt or assumpsit. Liens will be fully considered upon a future occasion.

But I think it proper to take notice here of a case, which is cited in all the books with approbation under this subject, viz. *Ex parte Deeze*, 1 Atk. 229.

31. And whereas it may be found necessary, That as well assignments of bankrupt's estate already made by

A packer had a demand for packing the goods, and the owner owed him a sum of money besides; Lord Hardwicke held he might retain for both, observing "What right has a court of equity to say, that if he has another debt due to him from the same person, that the goods shall be taken from him without having the whole paid?" *Ex parte Deeze*, 1 Atk. 228. 1723.

This report, as it stands alone in Atkyns, is contrary to all the subsequent decided cases upon the law of liens, and must necessarily mislead the student and the practiser.

Six years afterwards, Lord Hardwicke himself corrected this error; and decided that a miller could only retain for the grinding of corn, which he had in his possession, and then gave a reason for his decision in *Ex parte Deeze*, which does not appear in the report of that case, viz.

"In the petition *Ex parte Deeze*, 1748, before me, there was evidence, that it is usual for packers to lend money to clothiers, and the cloths to be a pledge not only for the work done in packing, but for the loan of money likewise." 1 Atk. 237.

With this reason, *Ex parte Deeze* may be reconciled with the judgment in the report in which it is inserted. *Ex parte Ockenden*, 1 Atk. 235.

It is now fully established that without an usage or agreement, there cannot be, either in law or equity, a lien for a general balance.

It should seem that there might be a balance in bankruptcy in every instance in which there could be a set-off under the statute of set off, but the balance in bankruptcy is far more extensive. Under the statute of set off, it has been held that in an action of debt against a man on his own bond, he cannot set off a debt due to him in right of his wife, from the plaintiff. *Painter v Walker*, Bull. N. P. 179.

If the husband brings an action in his own name, the defendant cannot set off a debt due to him by the plaintiff's wife, dum sola. *Wood v. Akres*, 2 Esp. 594.

In these cases at law, the plaintiff and defendant are

commissioners, as assignments hereafter to be made, pursuant to the choice of creditors, should be vacated and

not convertible; the action in the first case being by the husband alone, and the counter action must be by the defendant and his wife.

In the second case, the counteraction would be by the defendant against the plaintiff and his wife. They are therefore not within the statute of set off.

But I conceive it could not be doubted but these debts may be balanced in bankruptcy.

In both these cases, if the plaintiff was a bankrupt, the defendant might prove under his commission, and receive the dividend for his own use.

It has not yet been decided that these cases may be balanced in bankruptcy, but I think we may safely draw that conclusion from the case of *Miles v. Williams*. 1 P. Wms. 249, p. 265 ante.

If the debt could not be proved under the commission, then I think, we may conclude that it cannot be set off or balanced; for if the party cannot have the benefit of part of this debt by a dividend, he ought not to have the whole allowed in a balance or set-off against a debt due to the bankrupt.

In proving a debt under a commission, it is now indisputable, that no one can prove a debt which is tainted with usury. He could not have recovered any part against the bankrupt in an action at law, so he shall not recover against his estate under a commission.

Lord Hardwicke himself has said, that,

“The rule of the court is upon a bill to be relieved against demands of usurious interest, not to make void the whole debt; but it must be on submission to pay what really is due: but it is different in a commission of bankruptcy. For then the question is, whether the assignees have not a right to insist that the whole is void, as an usurious contract? They have such a right.” *Ex parte Skip*, 2 Ves. 489. 1752.

Lord Hardwicke upon the petition of a creditor to be admitted to prove a debt, which had been refused on account of usury, seems to have held the same six

a new assignment or assignments be made of the debts and effects unreceived and not disposed by the then

years before in directing an issue to try the usury. *Esparle Thompson*, 1 Atk. 125. 1746.

Lord Hardwicke has been represented as having decided that a debt upon an usurious contract might be balanced in bankruptcy, in *Ryal v. Rowles*, 1 Ves. 375. 1749.

The case is stated with great confusion, but I conceive it never has been decided, or ever will be decided, that in an action by the assignees to recover a just debt to the bankrupt's estate, the defendant may have the full benefit of a loan of money to the bankrupt upon usurious interest, which as a debt he could not have proved under the commission.

But if the bankrupt has lent money to a person upon usurious interest, which neither he nor his assignees could recover at law, if the borrower claims to prove a fair debt due to him from the bankrupt, then the commissioners ought to refuse such proof until he accounts for by a balance what he has illegally taken from the bankrupt's estate. This I conceive to have been the meaning of Lord Hardwicke when he said, "But as to the general question, whether this case is within the act for mutual credit, I am of opinion it is; and that there is no distinction taken on what consideration it is the debt sought to be set off has arisen."

"This is a debt due from Stephens to Harvest (the bankrupt) a debt in equity, though possibly no remedy at law, because the law admits not the party to an usurious contract to have a remedy; not allowing an indeb. assumpsit for money had and received, though perhaps it may allow a prosecution on the act. But this court goes not on that rule, but takes it to be a fraud and imposition on a party in necessitous circumstances." *Ryal v. Rowles*, 1 Ves. 375. 1749.

I cannot agree with Lord Hardwicke if he meant to say, that mutual debts, legal or illegal, could in all cases be balanced in bankruptcy. The legislature surely did not intend to legalize here what courts of justice were bound not to aid or protect. But I conceive where a

assignees to other persons to be chosen by the creditors, as aforesaid; be it therefore enacted and declared by the

party had obtained the bankrupt's property under such circumstances, that a bankrupt as *particeps criminis* could not have recovered it; or if the assignees cannot recover it, on account of the illegal consideration; the commissioners, under the authority of the chancellor, will not permit that party to have the benefit of a fair debt from the bankrupt till he has accounted for what he has so wrongfully obtained. By this means they can prevent him from taking advantage of his own wrong.

In *Ex parte Deadney*, 15 Ves. 498. see p 221, ante, Lord Eldon decided that a debt barred by the statute of limitation, could not be proved; such a debt therefore ought not to be set off in bankruptcy.

In an action by the assignees, the defendant may plead the statute of limitations; and he may therefore prove a debt without being subject to set off what is so barred.

But the commissioners under section 16 of this statute, have, I conceive, a power to compel a supposed debtor to a bankrupt's estate to answer upon his oath, whether he ever obtained money or goods from the bankrupt, at what time, and whether he has ever repaid the bankrupt, or restored the goods? See p. 178, ante.

In all cases where there are mutual claims or demands, a reference to the commissioners must be a jurisdiction far superior to a trial by jury in a court of *nisi prius*; for in every case the commissioners can examine the bankrupt, the assignees, and the defendant themselves, and can even compel them to answer questions, which a court of equity has not the power of doing. See p. 181, ante.

The chancellor afterwards in a summary way can both correct the errors of the commissioners, and restrain the proceedings of the assignees.

The commissioners can take into consideration an equitable set-off, on a debt which can only be recovered in a court of equity, which a court of law cannot enquire into; but when the balance is ascertained by the commissioners to be in favor of the bankrupt's estate, then it can only be recovered in an action at law, or by a

authority aforesaid, That it shall and may be lawful to and for the lord chancellor, lord keeper, or com-

suit in equity; but if the balance is against the bankrupt, then the chancellor can order so much to be proved.

If a verdict is obtained in a court of law by the assignees, it still seems competent to the defendant to petition the chancellor to set off some demand against the bankrupt's estate, which was not, or could not, be considered in a court of law; and the chancellor in bankruptcy might order it to be referred to the master or to the commissioners, and might direct the assignees to allow as a balance so much as was found to be due to the defendant.

Lord Hardwicke held that a verdict obtained by the assignees in a court of law, was not conclusive upon the defendant; but he might have by a bill in equity the benefit of a set-off which had been disallowed by the court of law. *Billon v. Hyde and Mitchell*, 1 *Atk.* 126.

But against assignees the chancellor in every instance can give the same relief upon a petition as upon a bill filed; and therefore where the relief prayed can be obtained by a petition, a court of equity will allow a demurrer to a bill filed. *Saxton v. Davis*, *Rose*, 79.

In an action of assumpsit by the assignees, the defendant gave notice of set-off of a debt by the bankrupt to the defendant and his partner, whom the defendant had survived. The court held that these debts might be set off or balanced, as the defendant might have declared for this debt, and also for any other sum due to him separately. *Slipper v. Stidstone*, 5 *T. R.* 493.

Where Church and Owen had given a bond to Bishop, and Church died, and Owen became a bankrupt, Mrs. Bishop, who was the residuary legatee and executrix of her husband, and who was indebted to Owen, was not permitted by Lord Hardwicke to balance these debts. His reason was, that it was not clear that there would be a residuum, or who would be entitled to it. *Bishop v. Church*, 3 *Atk.* 691. 1748.

Lord Hardwicke's reason in this case is not convincing. In expectation of being paid the amount of the bond by Owen, she probably bought his goods, which were to be considered as part of payment, or a mutual

missioners for the custody of the great seal of *Great Britain*, for the time being, upon petition of any creditors,

credit; and if there were not a surplus in her favour, she would be accountable to the creditors or legatees of her husband for what she had so obtained,

Wood had a legacy of 500*l.* left him, and Jeffs was executor; Wood was indebted to Jeffs, and became bankrupt. The master of the rolls allowed the debts to be balanced, and resolved that *an equitable demand is a debt within the statutes of bankruptcy. Jeffs v. Wood, 2 P. Wms. 128. 1723.*

That important case proves that there are many demands, which cannot be set off in an action at law, which may be balanced in bankruptcy.

This is strongly exemplified by the case *Ex parte Stephens*, decided by Lord Eldon.

Miss Stephens had placed more than 3000*l.* in her bankers' hands, in order that they should invest it in Navy Annuities. They falsely assured her that they had placed out her money as she had directed, and gave her credit for the dividends.

Her brother, who had a separate account with the bankers, borrowed of them 1000*l.* and Miss Stephens as a security joined in a joint and several promissory note.

The bankers became bankrupts, and the assignees brought an action to recover the 1000*l.* against the brother alone. He and his sister presented a petition that this might be allowed out of the account with Miss Stephens.

The chancellor represented and reprobated in strong terms the fraud which had been practised upon Miss Stephens; that she relying upon their honourable conduct, had been induced to be security for her brother, knowing they were doing her no favour, being secure from receiving the produce of her property, that natural equity required that this should be set off or allowed out of her account.

He therefore ordered that this should be balanced with what they owed her, and that she should prove the difference; and that the assignees should be restrained from suing either the brother or sister upon the note, *Ex parte Stephens, 11 Ves. 24.*

to make such order therein as he or they shall think just and reasonable; and in case a new assignment shall be

The chancellor's order upon a petition in bankruptcy operates as effectually as a writ of injunction upon a bill filed.

In another case, something similar, Hanson with a surety had entered into a joint bond to the bankrupt; the bankrupt was indebted to Hanson alone.

Lord Erskine held that these debts might be balanced. *Ex parte Hanson*, 12 Ves. 346.

Hanson was in fact the borrower; and though he had given them security by his surety, it was reasonable that he should not be placed in a worse situation on that account. If the surety had been bound by a separate instrument the case would have been clear.

It is now fully established that joint and separate debts cannot be balanced.

It is a matter of great importance and involved in some confusion; I shall therefore trace it historically.

At the end of the report of *Lord Lanesborough* and *Jones*, 1 P. Wms. 325, in which Lord Cowper decided with great clearness, that a mortgage and a promissory note might be balanced in bankruptcy long before any statutes of set-off, the reporter seems to have indulged himself in a speculation of his own.

"But it seems, if A. and B. are joint traders, and J. S. owes A. and B. on their joint account 100*l.* and A. owes the said J. S. 100*l.* on his separate account, J. S. cannot deduct so much as A.'s proportion of the 100*l.* comes to, out of the joint debt; for that the copartnership debts of A. and B. are to be first paid, before any of the separate debts; but if there be a surplus beyond what will pay the partnership debts, then out of A.'s share of the surplus, J. S. may deduct the separate debt of A." 1 P. Wms. 325, 1716.

I will not make any further observation upon it than that the erroneousness of the conjecture is fully exposed by Lord Eldon, as will appear from what I shall cite afterwards from *Ex parte Twogood*, 11 Ves. 517.

In the next case, "The petitioner was a creditor under

ordered to be made, as aforesaid, that then such debts, effects, and estate of such bankrupts shall be thereby

a separate commission against A., and a debtor to a joint commission against A. and B.; and he petitioned that the action brought by the assignees for the debt he owed to the joint commission ought to be staid, and that his demand upon the separate estate might be allowed as a set-off against the debt he owed the joint estate, especially as the same persons are assignees under both commissions."

Lord Chancellor: "I doubt whether this debt could be set off under the statute relating to mutual debts, because different persons are concerned in one debt and in the other, and in distinct rights; but as the petitioner's case appears to be a hard one, I will refer it to the commissioners to take an account how much the petitioner owed the joint estate, and how much was owing to him from the separate estate." *Exparte Edwards*, 1 *Atk.* 100.

Nothing further appears to have been done in it.

The next case upon the subject was decided by Lord Loughborough in 1796.

The partnership between Shepherd and Williams was dissolved. Afterwards Shepherd became a bankrupt. Williams paid all the partnership debts. The petitioner was indebted to the partnership, and Shepherd was indebted to him to a greater amount.

He petitioned to set off the bankrupt's share of the debt due to the partnership against the debt due from Shepherd to him.

Williams consented to receive his share of the debt.

Lord Chancellor: "As at law, there can be no doubt; for the action must be brought in the name of the two, and you cannot set off the separate debt of one.

"In equity it would be very hard, where it appears, that all the joint debts are paid, and that the other partner is satisfied, and there is a surplus, in which he is interested in one moiety, and the indebted partner in the other; it would be very hard, if to the extent of that moiety the creditor of that partner cannot set off. I think, the equity is a clear and a strong one. In *Exparte Edwards*, there could be no purpose in directing the account but with a view to allow it." *Exparte Quinten*, 3 *Ves.* 248. 1796.

effectually and legally vested in such new assignee or assignees; and it shall and may be lawful for him and

The master of a ship became a bankrupt, and all the port owners were jointly indebted to him, and he was indebted to several of them, who petitioned that they might set off their shares of the joint debt to him against his debts to them. Lord Eldon observed, this is nothing more than a set-off of a separate debt against a joint debt, which he said could not be done. *Ex parte Christie*, 10 Ves. 105. 1804.

The next case is in 1805.

The circumstances of the case are so entangled, that they are not worth stating, as the chancellor considered the effect of the petition to be the same as that in *Ex parte Quinten*; upon which he made the following observations.

“ If there are debts, which cannot be set off at law, can it be said, that all the affairs of the bankruptcy are to be suspended, until all the accounts are cleared, in order to see, what rights of set off there may be in the result? That should have been considered, before that case was determined. The consequence will be; that where there are joint and separate debts, which cannot be set off against each other at law, in every bankruptcy the proceedings must be suspended till the accounts are taken, and it is seen what the joint estate will pay, and what the separate will pay. If upon the account between them there was a clear surplus to Shepherd, that would be part of his general separate estate, to be handed over as such to his assignees, in trust for all his separate creditors, and would not be left in the pocket of one creditor, who paid that joint debt; but would be divisible, as part of the separate estate, among all the separate creditors.

“ I do not deny, that there is a good deal of natural equity in the proposition upon which this petition stands; but, pursuing it through all its consequences, it would so disturb all the habitual arrangement in bankruptcy, that I dare not do it.” *Ex parte Twogood*, 11 Ves. 517. 1805.

Whilst the present mode of proving joint and separate debts under joint commissions continues, which can only

them to sue for the same in his or their name or names, and to discharge any action or suit, or to give any acquit-

now be altered by the legislature, though it will be shewn hereafter, that perhaps originally it might have been different, these reasons of Lord Eldon must prevail.

Lord Rosslyn's decision would introduce much confusion and inconsistency.

In the case of *Bromley v. Goodere*, 1 *Atk.* where there was a great surplus, and interest out of that surplus was to be allowed upon all debts bearing interest, (see p. 13 ante,) Lord Hardwicke in his judgment said, "There is in this act a clause of mutual credit: suppose both debts carrying interest, and the creditor comes in late, certainly the commissioners ought to stop interest on both sides at the time of the bankruptcy, or compute interest on both sides till the settling of the account; for it is absurd to say they should stop interest on the creditor's debt at the time of issuing the commission, and carry on interest on the bankrupt's demand.

"I mention this to shew that an equitable rule ought to be followed in giving interest in these cases."

I do not remember to have seen any further equitable rule suggested upon this important subject.

But I cannot agree with Lord Hardwicke, that it is absurd that they should stop interest on the creditor's debt at the time of issuing the commission, and carry on interest on the bankrupt's demand!

If the bankrupt should owe by bond 2000*l.* bearing interest, and the obligee should owe the bankrupt 20*l.* or 200*l.* by note bearing interest, there seems to be no reason that this creditor should have interest computed beyond the date of the commission upon the balance of the account at that time, viz. upon 1980*l.* or 1800*l.* that would be the only sum I should permit him to prove, though the dividend was delayed for several months or years. Otherwise a trifling cross demand bearing interest would give one creditor a great advantage over the rest.

But if the balance was the other way upon similar mutual debts, it would be just and equitable that the debtor should pay interest to the assignees till the time of pay-

tance for such debts as effectually to all intents and purposes as the assignee or assignees, in the former

ment, for he has till then the benefit of the bankrupt's money in his hands.

And in that case both the legal and equitable rule seems to be that the principal and interest upon the debt due from the bankrupt, shall be subtracted from the principal and interest due to the bankrupt's estate at the time of payment.

That I conceive would be the mode of balancing the accounts at *nisi prius*, or perhaps the judge would direct interest to be computed upon each account till the fourth day of the ensuing term, when the assignees could recover the balance by a writ of execution.

(29) There is but one case upon this section. Walsh was convicted of perjury at York Assizes, 1796, and was sentenced to be imprisoned two years, and to stand in the pillory.

An action was afterwards brought against him by the assignees to recover the sum of 2283*l.* 15*s.* being double the amount of the sum which he had falsely sworn to.

The declaration stated the indictment and the judgment, by reason of which premises, and by force of the statute, an action had accrued to the plaintiffs as assignees, to demand and have from the defendant the said sum of money to be equally divided among all the creditors.

To this there was a special demurrer, assigning for cause that it was not directly stated that he was guilty of the offence.

The court held the declaration sufficient. And that the penalty was to be recovered by an action, and not by a judgment upon the indictment. Lord Kenyon observed very justly that this section referred to the former statutes.

The 13 *Eliz. c. 7. s. 7*, enacts that any person claiming what is not due, shall forfeit double the amount.

By 1 *Jac. 1. c. 15. s. 11*. whoever committed perjury by his *deposition*, shall suffer the punishment of perjury, as limited by the 5 *Eliz. c. 9*.

The next section (12), enacts that the forfeitures shall be sued for by action of debt, &c.

assignment might have done in case no new assignment had been made, any thing herein or in any former act

This section was no doubt intended to comprize the provisions of the former statutes.

(30) See the history of the appointment or election of an assignee under sect. 27 of this act.

The election of the assignees by the creditors, did not exist till the 5 *Ann. c. 22. s. 4*; and by *sec. 5*, the temporary or provisional assignee was first introduced. See p. 75 ante.

By this section the commissioners may assign the estate and effects of the bankrupt, *or any part thereof*. But by the 26th section, the commissioners must assign to the general assignees chosen by the creditors, *every such bankrupt's estate and effects*. Lord Hardwicke confounded these two sections, when he recommended it to the commissioners not to include copyholds in the bargain and sale to the assignees. See p. 256 ante.

The statute says, the design of this provisional assignment was for *the better preserving and securing the bankrupt's estate*.

The commissioners therefore execute a provisional assignment, where an extent from the crown is apprehended, or where the landlord can distrain for rent, which may be prevented, if the provisional assignee removes the tenant's property off the premises; or where it is necessary to keep a shop open, or to carry on a business till the general assignees are chosen.

Without a good cause of this kind the commissioners ought not to put the estate to the expence of a provisional assignment.

This assignee is to deliver up all the estate and effects of the bankrupt, which shall have come into his hands; that is, I conceive the estate or the produce of it. For one reason in granting a provisional assignment has always been to carry on a trade.

Much property may be of a perishable nature, which it is absolutely necessary the assignee should immediately dispose of.

In a case before the 6th list lately the commissioners were consulted, whether their provisional assignee could

contained or made to the contrary in any wise notwithstanding; and that the said commissioners shall cause

Notice of removal to be given in the Gazette.

sell a stage-coach and horses before the general assignees were chosen. It was represented if the sale was deferred till the assignees were chosen, the property would be greatly reduced in value. We were of opinion that the provisional assignee had a power to sell, and could give a good title to a purchaser, but he must act with such caution as not to afford ground of complaint to the chancellor.

Lord Kenyon has said, that this provisional assignment was introduced into the bankrupt laws in order to prevent the effect of an extent issued for a debt of the crown. *Austin v. Whitehead*, 6 T. R. 436.

I have stated before that the assignees were appointed by the commissioners alone till the 5 Ann, c. 22. That statute introduced the election by the creditors, which of course must take place several days after the adjudication of the bankrupt; and therefore, for the reason assigned by Lord Kenyon, and other reasons, the provisional or temporary assignee, was introduced by the same statute.

Connected therefore with this section, it will be proper to consider here the effect of the bankrupt statutes upon the crown, or the rights of the king.

In Magdalen's college case, 11 Co. 74. "It was resolved by the court where the king has any prerogative, estate, right, title, or interest, that by the general words of an act he shall not be barred of them; yet an act being general, and made to suppress fraud shall bind the king."

This is a wise rule of construction that the king might not by assenting to an act of parliament, divest himself of those valuable prerogatives, which the constitution has clothed him with for the good of his subjects, without clear and express notice.

In that case the counsel in argument say that the king may have the benefit of an act of parliament by which he is not bound. But that is the only authority I have seen for that proposition.

It has long been fully established that the crown is

public notice to be given in the two London Gazettes that shall immediately follow the removal of such as-

not bound by the bankrupt statutes, because he is not expressly named.

And there is internal evidence in the 21 Jac. 1. c. 19, s. 10, that it was not the intention of the legislature to bind the crown by that statute; and the legislature then must have thought that the crown was not bound by the two preceding statutes. That section enacts that if any one pretends he is debtor to the king, and shall extend the estate of the bankrupt after his bankruptcy, the commissioners shall examine whether the debt is due to him, or to some other person, or for the use of some other person; and if the bargain or contract was for the use of some other person, then the commissioners shall dispose of the goods so extended for the use of the creditors.

And the Barons of the Exchequer justly observed, that it afforded a fair inference that if there was a just debt due to the accountant of the king, and he extended the goods of the bankrupt after bankruptcy, that the commissioners had no power to intermeddle. *Queen v. Arnold*, 7 Vin. 104. 1709.

In that case it was decided that upon a writ of extent, the teste of which was after the act of bankruptcy, but before the assignment of the commissioners, the crown was entitled to a debt due to the bankrupt.

But though the crown was not in general bound by the bankrupt statutes, yet it was held by the sale or assignment of the commissioners, the property was altered, and the king's right was then gone. *Attorney General v. Capell*, 2 Show. 480.

The king is not bound by the modern statutes which introduced the certificate; for a bankrupt, who had obtained his certificate, being arrested upon an extent, moved to be discharged, but the court of exchequer said "the statutes of bankrupt do not bind the crown, and therefore we cannot discharge him, and it was ruled so not only in case of an extent, but even of an extent in aid." *Rex v. Pixley*, Bunb. 202. 1725. Same point, *Anon.* 1 Atk. 262. 1745.

signee or assignees, and the appointment of such other assignee or assignees as aforesaid, that such assignee or

If the extent sued out is tested the day upon which the assignment is executed, the extent shall have a preference.

Rex v Crumpton, 2 *Va.* 295. 1751.

The assignment has its operation from the execution of the deed, not from the time the assignees take possession.

The extent cannot be antedated, it has its teste on the same day upon which a *fiat* is obtained for it from one of the barons of the Exchequer. *Rex v. Mann*, 2 *Str.* 749.

The crown upon an extent, like bail, may arrest the bankrupt at any time, even when attending his last examination. *Ex parte Dick*, 2 *Bl. Rep.* 1142.

In such a case the commissioners must adjourn the examination to a future day, or request the officer to attend with the bankrupt till the business of the day is concluded.

In a case where the collector of the land-tax became a bankrupt, and the commissioners of the land-tax issued their warrant, under which the bankrupt's goods were seized before the assignment of the commissioners was executed; Lord Hardwicke, then chief justice, and the court of King's Bench decided, that though the warrant of the commissioners of the land-tax had not its operation like an extent from the day of its date, yet it being a process to recover a debt of the crown, and the property of the bankrupt not being changed before the assignment, it was a lien upon the goods seized, and that the assignees could not recover them till they had discharged the debt due to the crown. *Brassey v. Dawson*, 2 *Str.* 978.

This judgment I conceive will ever be respected as good law.

But in his reasons, Lord Hardwicke has advanced that, relations, which are but fictions of law, cannot bind the crown. *Hob.* 339. This being copied into every book

assignees is or are removed, and such other assignee or assignees appointed in his or their stead, and that such

upon the subject, I think it necessary to observe upon it, that it may not mislead the student, that the *relation to the act of bankruptcy*, or the power of the commissioners to convey every thing that the bankrupt was entitled to at the moment of the act of bankruptcy, was not founded upon any fiction, but upon the clear, positive, and peremptory declarations of the legislature, in 13 Eliz. c. 7. s. 2.

But notwithstanding an assignment, malt, candles, and the utensils for making them are still subject to the arrears of duty as they would have been in the hands of the bankrupt: This depends upon various excise acts cited in *Stracy v Halse*, Doug. 395.

If the commissioners of excise in such a case issue their warrant to seize all the bankrupt's goods, the warrant will be bad: it ought to be to seize those only upon which the crown has a lien for arrears. This was a claim like the former upon soap and the utensils.

I have observed before that in Magdalen's college case it was asserted by the counsel, that the king might have the advantage of a statute by which he is not bound.

I have heard this doubted by some learned men, who think the rights and power of the crown are the same as if the statute had never passed.

But it is now the common practice for the officers of the crown to prove debts due to the crown under commissions of bankrupt.

In these cases of revenue the king or the crown is the representative of the nation, and as the whole policy of the bankrupt law is to divide the loss amongst many, that it may not be the ruin of a few, I have often thought that it would be consistent with the dignity and justice of this great nation, if the power of seizing the whole of a bankrupt's estate by an extent, and thus depriving his creditors of the chance of recovering a portion of their own property, was removed by the legislature.

Bankruptcy necessarily generates bankruptcy, and we

persons as are indebted to the said bankrupt's estate, do not pay such debt or debts to such assignee or assignees as shall be removed as aforesaid. (31)

should all be shocked if any one should propose to pay off the national debt by a tax upon bankrupt's estates; but in fact we do precisely the same thing by continuing the present law, for every extent that sweeps so much from a bankrupt's estate carries it to the surplus of the annual revenue, or to the sinking fund.

As the officers of the crown now prove the debts due to the king under commissions of bankrupt, is it consistent with public justice and public policy that the nation should have the advantage of getting the start of all the creditors, and of grasping at the whole, and if they fail in that, of receiving a share with the private creditors, and after this of seizing all the future acquisitions of the bankrupt? I could wish to be thought a loyal subject and a friend to my country, yet I think it my duty to do all in my power to prevent that country from having more than its share of a bankrupt's estate. The love of our country will always be best shewn by kindness and compassion towards the suffering individuals of it.

Lord Eldon has declared in Wydown's case, "that in the bankruptcy of *Castell v. Powell*, the commission was brought to him in the middle of the night to be sealed, with the avowed object of preventing an extent; that considering it to be his duty to hold an *even hand* between the crown and subject, he without reference to the object got out of his bed and sealed the commission." 14 Ves. 88.

This kind and merciful instance of what the learned lord has considered even-handed justice, conveys a much stronger disapprobation of the existing law than can be expressed by any language of mine.

(31) This is a very important section, and it was first introduced into the bankrupt law, by the 5 Geo. 1. c. 24, s. 24, see page 104 *ante*. It gives the chancellor great power which he did not before possess. The assignee before that time was only known to the chancellor. whilst he presided in the court of chancery, in the character of vendee or trustee: here upon the petition of a cre-

Creditors, before choosing assignees, to fix the method of dividends.

32. And whereas by reason of monies which are lodged in the hands of assignees until a dividend is made, as-

ditor, the chancellor may make any just and reasonable order in vacating the assignment or removing an assignee. In consequence of the authority which the chancellor has derived from this section over the assignee, Lord Hardwicke has called an assignee *an officer of this court, and an officer of the commission. Ex parte White, 1 Atk. 90.*

When the chancellor orders all the assignees to be removed, he can order them to join in an assignment with the commissioners to the new assignee or assignees chosen as the original assignees.

And where an assignee became a bankrupt, Lord Hardwicke directed that both he and his assignees should join with the commissioners in the assignment to the new assignee. *Ex parte Newton, 1 Atk. 97.*

But the assignees of the assignee having no interest in or title to, the original bankrupt's estate, they seem to have been required to join from abundant caution; the title of the new assignees must have been considered in every court complete without them. See Lord Loughborough's order upon this subject, 8th of March, 1794. He directs in such a case generally, *that all proper parties do join.*

The statute gives the chancellor power to vacate the first assignment, then a second assignment is made precisely like the first, without any reference to it, and the second assignees have the same power as the first over all the bankrupt's effects not disposed of.

The authority of the assignees by the death of one survives to the others, and if they all die the heir at law of the survivor is the assignee; but if he is a minor or incapable of exercising the duties, the chancellor will vacate the first assignment, or the first bargain and sale, but not to affect purchasers. *Ex parte Rainbridge, 6 Ves. 451. Ex parte Leman, 13 Ves. 271.*

The word *assignment* in this section comprehends bargain and sale or every mode of conveyance by the commissioners to the assignees.

The order of the chancellor that an assignee shall be

assignees do oftentimes delay the dividing thereof, to the ^{Irish stat.} very great prejudice of the bankrupt's creditors; for ^{sect. 52.}

removed will not vacate his legal title, till he joins in a new assignment; for where one of four assignees was ordered to be removed, but nothing more was done, the other three brought trover for a ship the bankrupt's property; Lord Ellenborough and the court of King's Bench held they might recover three fourths of what the whole were entitled to. *Bloxam v. Hubbard*, 5 East. 407.

In this case the defendant might have pleaded in abatement, then the four must have joined in the action, or a new assignment must have been made.

If the assignee ordered to be removed had joined in an assignment to the three alone, or to three and others chosen, then in another action they might have recovered the remaining fourth or any other property of the bankrupt unrecovered.

When a new assignment is to be made from the original assignees, they all join in an assignment to the messenger, or solicitor, and then he assigns again to the remaining assignees and the new assignee: or at once A, B, and C, the old assignees, convey to the messenger and his heirs to the use of B, C, and D, and their heirs, these being the remaining and new assignees: so that the use by virtue of the statute is executed in B, C, and D, and the legal interest is thus vested in them; but the commissioners join, and the new assignees execute a counterpart with the usual covenants. This last mode may be adopted, where land has not been sold by the former assignees.

The causes for which the chancellor will remove an assignee are various and depend entirely upon his discretion. He will, upon proof of insolvency, or any misconduct, or that the assignee has to account to the other assignees, or upon the chancellor's order to the master, under circumstances to induce a belief the account cannot be fairly and impartially taken, be removed; but the simple circumstance of being liable to account is not alone a sufficient cause for his removal. 12 Ves. 10.

preventing whereof, and to the end assignees may make speedy dividends of the estate and effects of such bank-

Where the assignee is dead or actually a bankrupt, the commissioners must proceed to the choice of another assignee, upon the written application of any creditor, who has proved a debt to the amount of 10*l*. without any special order from the chancellor. General order, 8th March, 1794.

An assignee, a commissioner, or solicitor to the commission, cannot purchase the bankrupt's estate, or a dividend from a creditor, even if he should give more than any other person at a public auction. This is founded upon principles of sound or general policy, which sometimes cuts down the fairest and most honourable transactions, because if they were permitted in the case of assignees, they would introduce many unfair and dishonourable practices.

An assignee intending to purchase for himself would have a temptation to conceal important information respecting the estate from others, and would have an inducement to get it sold not for the greatest but the least advantage to the creditors.

For these reasons, if an assignee, commissioner, or solicitor to the commissioner purchases any part of the bankrupt's property, the chancellor will order the property to be put up to sale again by public auction, and he who advances most upon the former price, shall be the purchaser; but if there is no advance, then the assignee, commissioner, or solicitor, shall be bound to take it at the price he before offered. So also if they take a lease of the property, or purchase dividends of the creditors. For all these private dealings conflict with their public duty. *Ex parte Reynolds*, 5 *Ves.* 707. *Ex parte Hughes*, 6 *Ves.* 617. *Ex parte Lacey*, 6 *Ves.* 625. *Ex parte James*, 8 *Ves.* 350.

The chancellor removed the assignees for having purchased the bankrupt's property in *Ex parte Reynolds*, 5 *Ves.* 707.

An assignee will be removed, if his permanent residence is in Scotland, or out of the jurisdiction of the court. *Ex parte Grey*, 13 *Ves.* 274.

Or in short for any cause, which the Lord Chancellor

rupts, be it enacted by the authority aforesaid, that before the creditors shall proceed to the choice of an assignee or assignees of any bankrupt's estate, the major part in value of the said bankrupt's creditors then present shall, if they think fit, direct in what manner, how, and with whom, and where, the monies arising by, and to be received from time to time out of the bankrupt's estate, shall be paid in and remain, until the same shall be divided amongst all the creditors, as by this act is directed; to which rule and direction every such assignee and assignees, afterwards to be chosen, shall conform, as often as one hundred pounds shall be got in and received from such bankrupt's estate, and shall be and are hereby indemnified for what they shall do in pursuance of such direction of the said creditors, as aforesaid. (32)

thinks inconsistent with his duty as a trustee for the creditors and the bankrupt.

An assignee may be removed upon his own petition; but Lord Eldon said in such instances, it would be very proper to require, as in the case of attornies in a court of law, an affidavit that the party did not apply from an apprehension that an application would be made by others for his removal. *Ex parte Edwards*, 6 Ves. 3.

(32) This section is introduced here into the bankrupt law for the first time. I do not find any case depending upon the construction of it.

It appears that all the creditors, even those who are not qualified to vote for the assignees, may vote for the banker, and he is to be chosen first. When that is omitted, Lord Loughborough by his first order dated 8th March, 1794, has directed that the assignees shall place the money in the Bank of England as often as they shall receive 100*l*. The 49 Geo. 3, c. 123. s. 3, apparently with an ignorance of that order, has directed, when the choice of the banker is neglected, that after the choice of the as-

Method of making dividends.
Irish stat.
sect. 53.

33. And be it further enacted by the authority aforesaid, that every person or persons chosen, or who shall be chosen assignee or assignees of the estate and effects of such bankrupt, shall, at some time after the expiration of four months, and within twelve months from the time of issuing of such commission, cause at least twenty-one days public notice to be given in the London Gazette, of the time and place the commissioners and assignees intend to meet, to make a dividend or distribution of such bankrupt's estate and effects; at which time the creditors, who have not before proved their debts, shall then be at liberty to prove the same; which meeting for the city of London, and all places within the bills of mortality, shall be at the *Guild-hall* of the said city; and upon every such meeting the assignee or assignees shall produce to the said commissioners and creditors then present, fair and just accompts of all his and their receipts and payments touching the said bankrupt's estate and effects, and of what shall remain outstanding, and the particulars thereof; and shall if the creditors then present, of the major part of them, require the same, be examined upon oath, or being of the people called *Quakers*, upon solemn affirmation, before the said commissioners, or the major part of them, touching the truth of such accompts; and in such ac-

signees, the commissioners shall direct where the money shall be placed, provided they do not order it to be kept in any bank or banking-house, where any of them or the solicitor to the commission has an interest or concern.

In London, therefore, it will be adviseable for the commissioners to act consistently with Lord Loughborough's order, and direct that it shall be placed in the Bank of England.

compts the said assignee or assignees shall be allowed and retain all such sum and sums of money, as they shall have paid and expended in suing out and prosecuting of such commission, and all other just allowances, on account of and by reason or means of their being assignee or assignees ; and the said commissioners, or the major part of them, shall order such part of the neat produce of the said bankrupt's estate, as by such accompts or otherwise shall appear to be in the hands of the said assignees, as they or the major part of them shall think fit, to be forthwith divided amongst such of the bankrupt's creditors, who have duly proved their debts under such commission, in proportion to their several and respective debts ; and the commissioners, or the major part of them, shall make such their order for a dividend in writing under their hands, and shall cause one part of such order to be filed amongst the proceedings under the said commission, and shall deliver unto each of the assignee or assignees, under such commission, a duplicate of such their order likewise under the hands of the said commissioners ; which order of distribution shall contain an account of the time and place of making such order, and the sum total or *quantum* of all the debts proved under the said commission ; and the sum total of the money remaining in the hands of the assignee or assignees to be divided, and how much in particular in the pound is then ordered to be paid to every creditor under the said commission ; and the said assignee or assignees, in pursuance of such order, and without any deed or deeds of distribution to be made for that purpose, shall forthwith make such dividend and distribution accordingly, and shall take receipts, in a book to be kept for that purpose, from each creditor, for the part or share of such

dividend or distribution, which he or they shall make and pay to each creditor respectively; and such order and receipt shall be a full and effectual discharge to such assignee, for so much as he shall fairly pay, pursuant to such order as aforesaid. (33)

Assignees with consent of creditors may submit dispute to arbitration.

34. And whereas assignees are and may sometimes be prevented from making such speedy dividends of the

(33) This is an important head of the bankrupt law, as it is the main design and object of the whole system.

It will therefore be necessary to state concisely the history of it, or the steps by which it came into its present state, in order to communicate satisfactory information upon the law as it exists at present.

By the common law there was no mode by which a debtor could be compelled to give up all his property to be equally divided amongst his creditors.

That power was first introduced by the legislature in the first bankrupt statute, viz. the 34 and 35 Hen. 8. c. 4, in which the chancellor and the high officers of state were authorized to seize all the bankrupt's estate and effects, and to order the same for true satisfaction and payment of the said creditors; that is to say, to every of the said creditors, a portion, rate and rate alike, according to the quantity of their debts. See p. 2. ante. This statute extended to every subject.

The 13 Eliz. c. 7, confined all bankruptcy to traders; it introduced commissioners to be appointed by the chancellor, and gave them, in the same words, the same power of making a distribution amongst his creditors of all the bankrupt's estate. See p. 11 ante.

But by that statute there was no direction when the distribution or dividend was to be made.

By the next statute, 1 Jac. c. 15, that is provided for, and the 4th section directs, that other creditors besides those who sued out the commission, may join with them, if they come in within four months, and until distribution, provided they contribute to the charges of the commission. And if the creditors do not come in within four months, then the commissioners to have power to distribute. See p. 24 ante.

estate and effects of bankrupts, as by this act is intended Irish stat. sect. 54.
by reason of debts due, or pretended and claimed to be

No farther regulation respecting the dividend was made after that time till the present section was introduced.

This section declares that the assignees shall make a dividend upon the order of the commissioners, without *any deed of distribution for that purpose.*

It had been the practice for the commissioners to make the dividend by a deed of distribution; the form is given by *Serjeant Goodinge, p. 310, 2 Ed.*

By the 49 Geo. 3. c. 121. s. 12. No action is now to be brought for a dividend against the assignees; but the jurisdiction is now confined to the chancellor by a petition, who can order the assignee to pay it with interest.

Lord Mansfield and the court of King's Bench held, that a creditor might bring an action against an assignee for his share of the dividend.

"Lord Mansfield. I allowed the plaintiffs to recover their share of the dividend against the assignees, as money positively and expressly paid into the hands of the assignees for their use. We are all of opinion that the direction was right; that the action was maintainable, and that, after a debt is liquidated before the commissioners, it cannot be litigated but by an application to the great seal." *Brown v. Bullen, Doug. 392. 1780.*

Lord Redesdale in the court of Chancery in Ireland declared, "With respect to the action, which it is said might be brought for the dividend, I shall always restrain such an action, as contravening the policy of the bankrupt laws. Such actions I know have been maintained; but whatever may be the decisions of courts of law on the subject, I think it is the duty of the great seal not to permit them. The administration of the effects is vested in the great seal, and the creditor coming in to prove his debts submits to that authority."

Assignees of Gardiner v Shannon, 2 Sch. & Lefroy, 228, 1804.

There is a particular mystery thrown over the jurisdiction of the chancellor in bankruptcy, which can only be developed by attention to the historical progress of the bankrupt law.

due from such bankrupts; upon long and intricate accounts or demands, which are disputed or not admitted by the

Originally, the commissioners collected all the bankrupt's property, and alone made a dividend; and Stone, who read lectures only upon the first statute, the 13 *Eliz.* says, "If the commissioners will not pay a creditor his rateable part, he hath his action of debt."

When by the next statute an assignee of a debt was introduced, and it had become the practice of the commissioners to assign all the debts or the property of the bankrupt to him in trust for all the creditors; then each creditor for the dividend in his hands was allowed to bring an action. Serjeant Goodinge gives the form of the declaration in a *special action upon the case by a creditor against the assignees for his dividend of the estate*, p. 245.

The chancellor never exercised any summary jurisdiction over an assignee in bankruptcy, till the 31st section of this statute was introduced.

When it had become the practice to assign to him more than his share, and to make him a trustee for other creditors,—as they had an interest in his responsibility we, find that he was required to give a bond, and Serjeant Goodinge gives the form of *a bond from the assignees to the principal creditor in 2000*l.* to pay his proportionable share.* p. 324.

And if the assignees refused to account, the commissioners used to sue them, upon their covenants, which were introduced long before the assignees were elected by the creditors. *Harding v. Marsh*, 2 *Ch. Ca.* 153. It therefore abundantly appears that the judgment of the court in *Brown v. Bullen* was correct.

The chancellor's jurisdiction over an assignee commenced only with his power to remove him. Before that time he was subject to account to the court like every other trustee.

The jurisdiction of the chancellor in bankruptcy will be fully considered in a note to the first General Order.

When the dividend depended upon the 1 *Jac.* only, it was held, that the commissioners could not make a dividend before the end of the four months; *for the creditors which inhabit in the remote part of the realm, peradventure cannot have notice.* *Ruggle's case*, *Hutt.* 37. 1619.

commissioners and creditors to be just and fair debts, and such claimants are thereby obliged to ascertain such their

It was resolved also in that case if they came after four months, and any distribution was then made, they came too late.

It is worthy of much consideration that in this case Serjeant Arthur moved the court of Common Pleas, as it seems, only for the court to inform the commissioners, what they ought to do, as they entertained doubts.

The first petition to the chancellor praying that the assignee might be ordered to pay the petitioner a creditor his dividend, was made to Lord Talbot; but the assignee insisting he had a right to retain it, because he had paid so much for the creditor as a surety in a bond, Lord Talbot thinking this reasonable dismissed the petition. *Ex parte Nockold, Cooke, 590. 1734.*

But upon a similar petition being presented to Lord Hardwicke, and a similar claim being made by the assignee, Lord Chancellor declared "I will not allow the assignee, who is an officer of this court and an officer of the commission, to stop a person's share in the dividend on account of his own private debt, which is owing to him from that person: he has his remedy at law, and ought not to blend his own private affairs with the commission to which he is only a trustee." *Ex parte White, 1 Atk. 90. 1742.*

If the debt to the assignee is admitted by the creditor, it is then reasonable and equitable that he should retain so much; I should think it probable that if a petition was now presented to the chancellor under similar circumstances, he would adopt the decision of Lord Talbot, and not compel the assignee to pay what he might arrest the creditor for the next moment.

Lord Thurlow was of opinion that he must order the bankrupt's estate to be sold if any one creditor petitioned for it, though he thought it would be advantageous under the circumstances of that case not to sell the estates at that time; yet he said, "*If the order for sale is pressed for, I cannot refuse it; and the petition of any one creditor is sufficient.*" *Ex parte Goring, 1 Ves. jun. 168.*

demands by actions or suits in law or equity, which are oftentimes many years depending, and many other diffe-

Upon a petition to Lord Eldon to order a dividend to be postponed till a decree was obtained, he said, "the first question is whether I have a power, supposing there was one creditor who would not submit to have his dividend postponed to grant the prayer of the petition."

"It is impossible so to construe the act, that if the assignees neglect to make the dividend at the time prescribed, this court must compel them to do it immediately after."

"And I am anxious to state it as my opinion that it is in the discretion of the great seal, though Lord Thurlow thought it's jurisdiction more limited, to postpone the dividend; but when called on so to do, it ought to be satisfied the parties applying for that purpose have a right so to apply, and that it is for the general benefit of all the creditors that such postponement should take place." *Ex parte Kendall, Rose, 71.*

This is an authority, which the commissioners perpetually exercise and is immediately vested in them by the 13 *Eliz.* and the subsequent statutes.

For if the assignees call upon the commissioners to make a dividend, the commissioners, when they meet, if they think it will be for the benefit of the creditors in general, can adjourn it to a future day.

The chancellor has a control in all cases over the commissioners by virtue of his patronage, or the power of removing them; he has a direct authority given him over the assignees by the 31st section of this statute.

This section directs that the assignees shall give notice after the expiration of four months of the time of making a dividend.

But when they omit to give that notice for some time after the four months, it is the practice of the commissioners to direct a summons to the assignees to attend them at Guildhall to shew cause why a dividend should not be made.

The general reasons they assign are that they have no effects, or that some action or suit in Chancery is pending,

rences and difficulties do arise under commissions of bankrupts, which might be determined by arbitration, if assignees had power to submit the same; be it therefore enacted by the authority aforesaid, that it shall and may be lawful to and for the assignee or assignees of any bankrupt's estate and effects, by and with the consent of the major part in value of the bankrupt's creditors, who shall have duly proved their debts under such commission, and who shall be present at any meeting of the said creditors, pursuant to notice to be for that purpose given in the *London Gazette*, to submit any difference or dispute between such assignee or assignees, and any person or persons whatsoever, for or on account, or by reason or means of any matter, cause or thing whatsoever, relating to such bankrupt or bankrupts, his, her, or their estate or effects, to the final end and determination of arbitrators to be chosen by the said assignee or assignees, and the

or they expect remittances from abroad. But no creditors are present to assist the commissioners. For this the commissioners take no fees.

I have always been much surprised that Lord Loughborough's order (8th *March*, 1794) is not observed, which directs that the commissioners shall give public notice of this attendance of the assignees, that the creditors may be satisfied why the dividend is delayed. Or in all cases a meeting for a dividend ought to be advertized; if the assignees had no effects, the commissioners would forego their fees, and little more than the expence of the gazette would be incurred; by this mode of proceeding the creditors would have the satisfaction of hearing from the assignees upon their oaths the reasons why no dividend had been made, and what expectation there was of any in future. The commissioners ought then to adjourn if they thought it necessary to some certain future day. See more upon this subject under sect. 37. General order. 8th *March*, 1794, and 49 *Geo.* 3, c. 121. s. 5.

major part in value of such creditors, and the party or parties with whom they shall have such difference, and to perform the award of such arbitrators, or otherwise to compound and agree the matters in difference and dispute between them, in such manner as the said assignee or assignees, with such consent as aforesaid, shall think fit, and can agree, and the same shall be binding to all the creditors of the said bankrupt or bankrupts; and the assignees are hereby indemnified for what they shall fairly do according to the direction aforesaid. (34)

Assignees, with consent of creditors, may compound debts.

35. And be it further also enacted by the authority aforesaid, that any assignee or assignees, made or chosen as aforesaid, shall be, and is, and are hereby impowered, by and with the consent of the major part of such bankrupt's creditors in value, who shall be present at a meeting to be had for that purpose; of which public notice shall be given in the *London Gazette*, to make composition with any person or persons debtors or accomptants to such bankrupts, where the same shall appear necessary and reasonable, and to take such reasonable part, as can upon such composition be gotten, in full discharge of such debts and accounts; any law, custom, or usage to the contrary notwithstanding. (35)

(34) Attention ought to be paid to the directions of this section in the choice and appointment of the arbitrator.

Lord Hardwicke has said that the assignees must have a meeting of creditors upon notice given for that purpose in the *London Gazette*, to consider of each particular suit or each particular case for arbitration before they can proceed in them; a general authority to prosecute such suits as they in their discretion shall think fit, is not warranted by the statute. *Ex parte Whitchurch*, 1 *Atk.* 91.

(35) Upon this Lord Hardwicke has said if some of the creditors do not think proper to come, it is their own

36. Provided always, and be it enacted by the authority aforesaid, that after such bankrupt or bankrupts shall have obtained his, her, or their certificate, and the same shall be duly confirmed, as herein is mentioned, every such bankrupt or bankrupts shall, and is, and are hereby obliged to give his, her, or their attendance, upon every reasonable notice in writing, to be given to him, her, or them, or to be left at his, her, or their usual place of abode, by the assignee or assignees, or their order, thereby requiring him, her, or them, to attend the assignee or assignees of such bankrupt's estate, in order to make up, adjust, or settle any account or accounts between such bankrupt or bankrupts, and any debtor to, or creditor of such bankrupt's estate, or to attend any court or courts of record, in order to be examined touching the same, or for such other business which such assignee or assignees shall judge necessary for getting in the said bankrupt's estate and effects, for the benefit of his, her, or their creditors; for which said attendance the bankrupt shall be allowed and paid the sum of two shillings and sixpence *per diem*, by such assignee or assignees, out of the bankrupt's estate; and in case such bankrupt or bankrupts shall neglect or refuse to attend, or on such attendance shall refuse to assist in such discovery (without good and sufficient cause to be shewn to the commissioners, or the major part of them, for such his, her, or their neglect or refusal, to be by them al-

Bankrupts,
after allowance
of certificate,
to attend as-
signees in set-
tling accounts.

Irish stat.
sect. 56.

Allowance for
attendance.

fault, and those who are present have a right to bind the whole, if the majority in value at the meeting are of opinion to sign the composition. *Cooper v. Pepys*, 1 Atk. 106.

Imprisonment
on non-atten-
dance.

lowed as sufficient) such assignee or assignees, making due proof thereof upon oath, or being of the people called *Quakers*, upon solemn affirmation, before the said commissioners, authorized as aforesaid, or the major part of them; the said commissioners, or the major part of them, are hereby impowered and required to issue a warrant or warrants, directed to such person or persons as they shall think proper, for apprehending such bankrupt or bankrupts, and him, her, or them to commit to the county gaol, there to remain in close custody without bail or mainprize, until he, she, or they shall duly conform to the satisfaction of the said commissioners, authorized as aforesaid, and be by the said commissioners or the special order of the lord chancellor, lord keeper, or commissioners for the custody of the great seal of *Great Britain*, for the time being, or otherwise by due course of law discharged; and such gaoler or keeper of such prison, to which such bankrupt or bankrupts shall be committed, is hereby required to keep such person or persons in close custody within the walls of the said prison, until he, she, or they be duly discharged, as aforesaid, under the pains and penalties before mentioned for such gaoler or keeper suffering such prisoners, committed pursuant to this act, to escape and go at large. (36)

(36) This section gives the commissioners expressly a power to commit the bankrupt if he refuses to assist the assignees.

The statute declares that the Lord Chancellor by a special order in this case may discharge from the commissioners commitment.

Lord Eldon seemed to think that the chancellor by his general jurisdiction could enforce the bankrupt's attendance upon the commissioners. *Anon. 14 Ves. 449.* But the statute in this instance seems to have armed them with sufficient power so as not to require the aid of any higher authority.

37. And be it further enacted by the authority aforesaid, that within eighteen months next after the issuing of any such commission as aforesaid, the assignee or assignees shall make a second dividend of the bankrupt's estate and effects, in case the same was not wholly divided upon the first dividend, and shall cause a notice to be inserted in the London Gazette, of the time and place the said commissioners intend to meet to make a second dividend and distribution of such bankrupt's estate or effects, and for the creditors, who shall not before have proved their debts, to come and prove the same; and at such meeting every such assignee or assignees shall produce upon oath or affirmation as aforesaid, his, her, or their account or accounts of the bankrupt's estate and effects, and what upon the balance thereof shall appear to be in his, her, or their hands, shall, by the like order of the commissioners, or the major part of them, be forthwith divided among such of the bankrupt's creditors, who shall have made due proof of their debts, in proportion to their several and respective debts, which second dividend shall be final, unless any suit at law or in equity shall be depending, or any part of the estate standing out, that cannot have been disposed of, or that the major part of the creditors, shall not have agreed to be sold and disposed of in manner aforesaid, or unless some other or future estate or effects of the said bankrupt shall afterwards come to, or vest in, the said assignee or assignees, in which case the said assignee or assignees shall, as soon as may be, convert such future or other estate and effects into money in manner aforesaid, and shall within two months next after the same shall be converted into money, as aforesaid, by the like order of the commissioners, or the major part of them,

Final dividend
within eighteen
months.

Irish stat.
sect. 57.

Exceptions.

divide the same amongst such bankrupt's creditors, who shall have made due proof of their debts under such commission. (37)

(37) A second dividend is to be made in case the whole is not divided upon the first dividend. The assignees and commissioners are therefore not bound to reserve any thing for a second dividend.

This is the first time that the legislature has mentioned a second dividend.

When therefore the court of Common Pleas were of opinion that the creditors who came after a distribution, came too late, they probably thought that the whole of the bankrupt's property was then disposed of. *Ruggle's case*, Hutt. 37. 1619. see p. 316. ante.

Lord Hardwicke has held that "upon the common equity of this court, if creditors will make an affidavit that they have not read the gazette, they will be admitted, so as not to disturb the former dividend, and by that means must in the first place, be brought up equal to the creditors under the former dividend, before the commissioners can proceed to make a second." *Exparte Stiles and Pickart*, 1 Atk. 208.

But Lord Thurlow said, "he took the law to be, that if a debt is proved after a dividend, the creditors are to take *pari passu*; but if the assignees have been in a habit of paying otherwise, they must do it without order. *Exparte Long*, 2 Bro. 50. 1786.

But it has long been the practice for the commissioners to admit the proof of debts after the first or any dividend, if there is no objection to their validity; and if the effects will admit of it, to allow a dividend upon them to the extent that the former creditors have received, and then admit the whole to an equal dividend upon the remainder.

It had been the practice in Ireland to admit creditors coming in after the first dividend to their share of the future dividends only; but Lord Redesdale held that "where every thing on the part of the creditor has been fair, and the delay is occasioned by accident or unavoidable circumstances, the commissioners ought to apply the fund in the first place to put the creditor on a footing with the others, and if there be enough all must take alike in

38. Provided always, That no suit in equity shall be commenced by any assignee or assignees, without the

No suit in equity to be commenced without consent of creditors.

the future dividends." In the matter of *Wheeler*, 1 Sch. and Lef. 242. 1803.

Where a creditor came after a dividend, and fifteen years after the date of the commission, when the bankrupt and the assignee were dead, Lord Hardwicke would not admit him to prove to receive any thing under the commission. *Ex parte Peachy*, 1 Atk. 111.

When creditors are not prepared to prove their debts or the exact amount, but can shew to the commissioners that it is probable that something is due from the bankrupt's estate, they are permitted to claim what the commissioners under the circumstances stated to them upon oath may think reasonable; if these claims are not substantiated, or turned into a positive proof at the first dividend, they are considered as proofs in calculating the dividend, and a dividend is reserved upon them in the hands of the assignees. But at a second or at a final dividend, they must be struck out, if they are not substantiated.

Besides the general notice in the Gazette of the dividend, I have always wished that the assignees or the solicitor should give a special notice to the claimants to attend to make good their claims before they are struck out of the proceedings.

These claims are not mentioned by the legislature till the next statute, viz. 19 Geo. 2. c. 32.

The commissioners of the great seal, Trevor, Rawlinson, and Hutchins, decided that the assignees might make a dividend without selling the bankrupt's land, upon an admission of its value; the court said, "nothing is more usual than to make a distribution before the estate be actually sold, and the words of the act of parliament are, that the commissioners shall have the ordering of the bankrupt's estate, so there is no necessity for them to sell and distribute the money amongst the creditors: if they allot a proportion of the land to each creditor, it is well enough." *Hutchcocke v. Sedgwick*, 2 Vern. 156. 1690.

No creditor could object if the assignees divided their own money till the estate could be sold. But the assignees must have done this at their own risk; they would

consent of the major part in value of the creditors of such bankrupt, who shall be present at a meeting of the creditors, pursuant to notice to be given in the *London Gazette* for that purpose. (38)

have no remedy if they divided more than the estate was afterwards sold for.

When land and effects were distributed unsold, all the creditors and the bankrupt must have assented to a distribution in kind; for each of them would have had an interest that all the property might have been converted into the most money, which could have been obtained, and that a dividend should have been made of that money.

(38) The power of the assignees to bring actions independently of the commissioners or the creditors, depends upon the 1 Jac. 1. c. 15. s. 13. which declares most fully, "that the party to whom the same debt shall be assigned shall have like remedy to recover the same as fully and lawfully in the name of the persons to whom the same shall be so assigned by the commissioners, in all respects and purposes as the party himself might have had."

This assignee at the first was a grantee for his own benefit, then by practice he became a trustee for others.

And when he became elective by the creditors, his power was and is still derived from that statute. That power was as extensive as the bankrupt's. And it was thought advisable by the legislature to restrain it in particular instances, viz. by section 34, the assignees shall not refer to arbitration without the consent of the creditors. By section 35, they shall not compound without such consent. By this section, they shall not commence a suit in equity without such consent.

All these are restrictions upon the original power of the assignees.

In p. 236, I have suggested that if the bankrupt and his assignees were to join in suing out a commission of bankrupt against a debtor to the bankrupt, it would be held to be a legal commission. Since that page was printed, a commission was directed to my list, upon the

39. And whereas persons dealing as bankers, brokers, Bankers, brokers, and factors, are frequently intrusted with great sums of money, and with goods and effects of very great value belonging to other persons; it is hereby further enacted, That such bankers, brokers, and factors, shall be and are hereby declared to be subject and liable to this and other the statutes made concerning bankrupts. (39)

Bankers, brokers, and factors liable to statutes.
Irish stat. sect. 1.

petition of the bankrupt and his assignees; we proceeded in it, and though the commission is contested by the bankrupt before the chancellor, by a denial of a sufficient debt due to the bankrupt, yet no objection has been made to the characters of the petitioning creditors.

This is not a proceeding which requires the consent of the creditors at large; but Lord Hardwicke has said, "that the assignees are very much to be commended for advertising meetings upon any other extraordinary occasion that concerns the creditors, because, where they are numerous, there is no way so good, to collect the whole body together." *Ex parte Proudfoot*, 1 Atk. 253.

If a majority of creditors at a statutable meeting resolve that the assignees shall not bring a bill, yet any creditor may do it at the peril of paying the costs out of his own pocket. *Franklyn v. Fern*, *Barnardiston's Rep.* 30.

(39) This section was first introduced in the bankrupt law by 5 Geo. 1. c. 24. s. 27.

These were not considered as comprized under the general description of a trader, who sought his living by buying and selling.

Lord Hardwicke has observed upon this section, that this clause relating to bankers took its rise from that part of the 21 Jac. 1, relating to scriveners, who were more numerous than in latter days; for bankers have taken upon them to act as scriveners, and therefore made it necessary for the legislature to add bankers as being liable to commissions of bankruptcy. And a person may act as a banker, though he does not keep an open shop. *Ex parte Wilson*, 1 Atk. 218.

Lord Hardwicke has held that a pawnbroker is included in the word broker. "For though pawnbrokers (he ob-

Persons not
liable to be
bankrupts.
Irish stat.
sect. 2.

40. Provided always, and it is hereby further declared and enacted by the authority aforesaid, That no farmer, grazier, or drover of cattle, or any person or persons who is or are, or shall be receiver general of the taxes granted by act of parliament, shall be intitled as such to any of the benefits given by this act, or be deemed a bankrupt within the same, or within any of the statutes now in force concerning bankrupts; any law, custom, or usage to the contrary notwithstanding. (40)

serves) are not expressly named, yet the general word *broker* is the genus, and all other kind of brokerage the species." *Highmore v. Molloy*, 1 Atk. 206.

(40) This section is the same as the 5 Ann, c. 22, s. 8. and it was there first introduced. Before that statute it had been held that a farmer did not come under the general description of a trader, but that a grazier or drover might as a trader be a bankrupt. *Cro. Car.* 549. *Goodinge* 15. 212.

In the three first statutes, 13 Eliz. 1 Jac. and 21 Jac. a trader is described in nearly the same words, viz. a person using the *trade* of merchandize, by bargaining, exchange, &c. or seeking his *trade* of living by buying and selling. In the last statute the second word *trade* is omitted, which seems to make the better sense of the second clause, viz. a person seeking his living by buying and selling. And these words have always been construed to mean the same as the *trade of merchandize*. The articles bought must either be sold again in the same state, or improved and manufactured by the labour and art of man, not changed by the operations of nature.

As if a farmer should buy all his seed corn, and sell the crops, or buy cattle and sell the produce; though he seeks his living by buying and selling, yet it is not by the trade of merchandize.

But though a man cannot in the character of a farmer only be a bankrupt, yet a farmer may be a horse-dealer, a corn merchant, a potatoe merchant; if he buys horses, corn, potatoes, &c. to sell again is a general dealer in these articles.

In a case where a man previous to his taking a farm, had

41. And whereas commissions of bankrupts, and the ^{Proceedings} depositions taken before the commissioners of bankrupts, ^{may be entered} on record.

attended fairs, and occasionally bought and sold horses, and after he took the farm he had bought in the course of two years five or six horses not calculated for his farming business, but which he sold soon afterwards for a profit, he was held to be a horse-dealer, and subject to a commission of bankrupt. *Bartholemew v. Sherwood*, 1 T. R. 573.

But in a subsequent case it was decided, that, where a farmer, bought occasionally hay, corn, horses, and pigs, which were connected with his occupation as a farmer, but with an intent to sell again what he did not want, for profit, he could not be considered as a dealer, subject to the bankrupt laws. *Stewart v. Ball*, 2 N. R. 78.

It does not seem material how small is the extent of dealing or the amount of profit aimed at, if there is a general intent to continue the buying and selling independently of other concerns.

If the greatest farmer, or a gentleman or nobleman, should keep a small retail shop, or carry on any trade, however insignificant, for the sake of profit, he may in consequence of such dealing be a bankrupt. Where it is unconnected with a farm, the intent would be clear; but where the dealing is mixed with the concerns of a farm, there will always be a difficulty even for a jury to decide upon the general intent.

A jury I conceive ought never to be called upon to interpret the terms of law, or the expressions of the legislature; but they may find the facts, viz. whether there was a buying and selling, with a determination to continue in it, with an intent to gain a profit beyond the regular profits of a farmer: from such facts the judge or court must pronounce the law.

The great confusion which has long existed, whether the owner of land manufacturing the produce of it into bricks, or any other article for public sale, has lately been in a great degree dispelled by the judgment of the court of King's Bench, in the case of *Sutton v. Weeley*, 7 East 442.

In that case Weeley took a freehold estate by devise,

Irish stat.
sect. 59.

and the proceedings upon such commissions, are most commonly kept by such persons as act as clerks or se-

and manufactured bricks upon it to a great extent for public sale.

The question was whether he was a trader subject to the bankrupt law.

Lord Ellenborough said, "in the present case Weeley by devise, took a freehold interest in the brick earth, and can in no way be considered as buying any thing, which he sold again; but like the burner of his own chalk or rock into lime, the smelter from his own mines of iron or lead ore into pigs, or the manufacturer of his own rock into alum, he appears to have merely carried his own soil to market in some way manufactured.

"The selling the soil in a state essentially altered by various processes of manufacture, has been holden not to convert the land owner into a person, who can be properly said to carry on the *trade of merchandize*."

"These words cannot be satisfied without *both a buying and a selling*. But he, who burns the clay of his own lands into bricks, and then sells them, is no buyer of any thing to sell again."

The judgment of the court was therefore that he was no trader. It was an issue directed by the chancellor.

This case was different from the former decisions upon brickmakers; Lord Ellenborough observed "inasmuch as in the former cases the earth employed in making bricks was acquired for that very purpose: and it is not necessary to say what would be our opinion if a case similarly circumstanced to the one or the other should come before us."

From this luminous judgment it is now my duty to approach the obscurity and confusion in which *the former cases* are involved and I think it is not difficult to predict what will be their fate, if they are ever reconsidered by a court of law.

I mean particularly the case of *Exparte Harrison*, decided by Lord Thurlow, 1 *Brown* 173, and *Wells v. Parker*, as it was decided by Lord Mansfield and the court of King's Bench, 1 *T. R.* 34.

cretaries to such commissioners, and by reason of the death of such clerks or secretaries are many times lost

I shall therefore state concisely all the cases, bearing upon the subject according to their dates.

The first is a *nisi prius* case before Lord Mansfield. *Newton v. Newton*. *Sittings*, 1757. *Cooke*, 57.

The supposed bankrupt was lessee of some alum works, under an agreement to make it at a certain rate per ton. Evidence was given as to the manner of enjoying such works; that the rude mass is the rock; it is dug, burned, steeped, and boiled in lead, and then mixed with kelp lees and urine.

Lord Mansfield said "if a man mixes an ingredient out of his own soil with others, this trifling ingredient shall not make him a trader. The alum is not an ingredient of the kelp and urine, but they are as necessary to make it alum, as threshing corn or malleating iron. Then is there any authority that a man, who makes the best of his produce, in coming to market by one, two or three processes, shall be deemed a trader? It must be a general buying and selling, not a special one for a particular purpose."

Lord Mansfield here at *nisi prius*, had a correct conception of the subject.

The next is another *nisi prius* case before Lord Mansfield, *Watkins v. Caddell*, 1779. Where Lord Mansfield on the trade of an iron master, held that the owner of the land merely preparing the produce for market is not a trader as in the case of an alum work; but where the *foundation of the estate was made the basis of a manufacture*, as in the case of a brick-maker, that would make a man a trader, and cited two cases on the home circuit of brick-makers being found bankrupts. *Cited in Ex parte Harrison*, 1 Bro. 173.

It is extraordinary that Lord Mansfield having reasoned so correctly with regard to alum and iron, should have fallen into such an error respecting bricks, without assigning any intelligible reason for the distinction.

The next case is *Port v. Turton*, C. B. 2 Wils. 169. 1763.

J. S. in consideration of 1600l. grants and sells to Sparrow, his executors, &c. a certain mine of coals, reserving a certain annual rent so long as any coals are to

and mislaid, by means whereof such persons as have or may purchase any messuages, lands, tenements, or

be gotten therein. Sparrow worked the mine and sold the coals, and committed an act of bankruptcy. The question was, whether this coal mine, made him a trader.

Lord Chief Justice Camden, after stating the trading described by 21 Jac. c. 19, observed, "By buying and selling what? Surely not by buying an interest in land and selling the profits thereof. This can never come within the idea of using the trade of merchandize, or getting a living by buying and selling, in the sense of the legislature. Whatever the owner of land in fee may do, surely he who rents it may do the same. The buying and selling which is within those statutes, is to be confined to persons who live by a credit gained on an uncertain capital stock.

"Neither the owner, or farmer of an interest in land by buying and selling the same, or profits thereof, are liable to bankruptcy.

"The case of the alum-works is much stronger than this. The case of a brick-maker is very different; the earth is manufactured and turned into quite another thing; but coals carried to market are the same as they were found in the earth."

This seems to be extremely correct reasoning upon the point decided, and Lord Camden concedes the point of the brick-maker, to avoid a labour which was not then necessary for him to engage in.

The next case is that of *Ex parte Harrison*, 1 Brown, 173. 1782.

This was a petition for a new trial upon an issue to try the question, whether the petitioner was or was not a bankrupt. At the trial it was proved, that the petitioner, who was a farmer, made bricks of earth taken off the waste, without any licence from the lord, to whom he afterwards paid a consideration, that he had used a kiln, not built by himself for that purpose, and sold bricks to all who came for them.

Mr. Justice Buller, who tried the cause, told the jury the question was, whether the bankrupt kept a public sale-kiln; if he did, it was a trading within the bankrupt laws; but if it was a mere private kiln, for his own use,

hereditaments, under any commission grounded upon the statutes made concerning bankrupts, may be disabled to

and that having too many he had only sold to a neighbour, that would not be such a trading.

The jury found it was a public sale-kiln. Lord Thurlow in his judgment observed "that the clay was dug for the bankrupt, and under his authority, which made it the same as if he had the lord's licence to take the materials he found necessary for the making the bricks.

"If a great farmer kept a chandler's shop, it would be in vain for him to say he was a farmer; the manner, more than the quantity, points that it is seeking his living.

"I should think if it was brought to a neat question, and the jury thought he only meant to bring his own produce to perfection, they would be right not to find him a bankrupt; but it would be very difficult to bring that idea before a jury: and the question would be whether the man meant to carry on a trade, or merely to meliorate the produce of his own estate. It is very different where a man sets up to sell bricks, and goes about the country to collect materials; the collecting materials will be held ancillary to the general purpose: purchasing the earth by obtaining a licence to dig in the waste, might, and I think would be held to be for the purpose of carrying on the trade. Here the earth was not purchased, but taken by way of trespass, which would amount to obtaining a licence, and that brings it within the bankrupt laws, that it was not to improve his own estate, but a purchasing of the earth by licence, ancillary to carrying on the trade of a brickmaker."

Feeling it my duty to state the result of my examination of every decision, it is difficult to do it, in this case, with the respect I would wish always to observe towards the high authorities, whose words I have just cited.

It seems to be a strange question for the jury to determine, merely whether it was a public sale-kiln or not. They were told, if it was a public sale-kiln, he was a trader; and that they were to find a verdict accordingly for the assignees, the plaintiffs.

The *buying*, and the trade of *merchandize*, required by the statutes, are here entirely unnoticed and suppressed.

make out their right and title to the same; and there being no certain place where the creditors of any bank-

It does not seem to have been suggested to Lord Thurlow's mind, that the trade of merchandize, must consist in the purchase of personal property. :

The taking the clay by trespass, and afterwards making satisfaction for it, cannot make the clay of a different nature, when it was so taken, from what it would have been, if he had agreed to have bought it, or to have rented it; and then it would have been part of the freehold or realty; and the purchase of it would not have been a buying of merchandize, within the meaning of the legislature.

If clay, iron-ore, stones, coals, &c. are severed from the realty, so that larceny may be committed by taking them; or that they will pass to the owner's personal representative; then the buying of them, and selling them again in any form, will constitute a trading. But if the manufacturer takes them whilst they are part of the freehold, or in such a state, as they would descend to the seller's heir at law, I am confident he will never in future be considered a trader, by such a purchase.

The next case is that of *Parker v. Wills*, 1 *Brown*, 178. 1 *T. R.* 34. *Cooke* 41. 1785.

The question before the court of Common Pleas, where the action was commenced by Parker, the brick-maker, who had been declared a bankrupt, against the messenger, was merely whether a lessee for twenty-one years of a farm, upon which bricks before had been made, by making bricks of the clay dug upon the estate, and by the purchase of sand and fuel necessary for manufacturing, and by selling them so manufactured, was a trader.

Lord Loughborough pronounced the judgment of the court, that he was a trader. This judgment is given at length, *Cooke* 41. It may be considered one of the most clear and able judgments he ever delivered.

It fills several pages; it is in every part consistent with the judgment lately pronounced by Lord Ellenborough, in *Sutton v. Weeley*, p. 329 *ante*.

There can be no distinction between a tenant in fee simple, and a tenant for years: upon that Lord Loughbo-

rupt, or any person or persons claiming any estate or interest in any messuages, lands, tenements, or heredita-

rough well observes. "The question therefore is, whether there is any authority, that the man who makes the best of his produce in coming to market by one, two, or three processes, shall be deemed a trader. But I hold that the owner of an estate, where he can avail himself either of the produce of that estate entirely, without the addition of any other materials, or by a mixture of small ingredients, in order to put that produce into such a state as to make it marketable, does not upon that account subject himself to the bankrupt laws. How does he seek to gain his trade of living, which is the phrase? Why, I fancy there is no plain common man, in the country, that would not immediately answer to that question; he lives of his own, he avails himself of that property, which comes to him, either by descent or by purchase; but upon his own stock, and by his own industry, raises to himself a profit out of the land: his possessions are open and visible to all the world; the extent therefore of his credit may be measured by it, and the course of his business does not complicate or connect his credit with any other persons."

"Then it is argued, there is a difference between the real owner and the lessee; the lessee being the purchaser of the earth, by the rent which he pays; and every profit which he derives out of the land, the rent is supposed to be a compensation for; and therefore he is to be deemed a purchaser of the brick earth; and that if a person specifically purchases the brick earth, he would be liable to a commission."

"I take it the buying and selling must be of an actual commodity: we are accustomed to use the word *purchase*, for many purposes of legal reasoning; a lessee is a purchaser of all he derives out of land, by the payment of the rent; but that certainly is not the idea in which the words *buying and selling* are used in the statute."

From this excellent judgment, there was a writ of error brought in the King's Bench, and unfortunately this judgment was reversed.

Lord Mansfield delivered the judgment of the court. In the reasons there is nothing I can select with approbation; and the authorities referred to were only what

ments, by or under any such commission, as aforesaid can have recourse to such commission, and the proceed-

he himself had ruled at *nisi prius*, and what Mr. J. Buller had held at *nisi prius* in the preceding case.

The facts also were thrown into confusion; it was urged that the bankrupt was not the lessee, but the son of the lessee, who took the earth by his father's gift or licence.

But if that had been clearly the case, still I presume from the observations I have made upon the preceding case, he could not be a trader. If a father gives his son land, he does not give him merchandize; and if he gives him personal property to sell again for his profit, the son cannot be said to *buy*, and he would have no reason to contract debts with traders, so as to be an object of the bankrupt laws. Receiving as a gift, and selling, surely are not the same as buying and selling. From the judgment of the court of King's Bench there was a writ of error to the House of Lords; and there, conformably to the opinion of the judges taken upon it, it was adjudged that the court of King's Bench do award a *venire facias de novo*, in order that the facts might be better ascertained.

There was another action, and another commission, which was submitted to, but nothing was to be learnt from them.

So this unfortunate case, after it left the Common Pleas, has only served to fill all our books with perplexity and error.

What then must be done by commissioners, when a tenant for years makes bricks for sale, from the clay of his farm, or where he takes the clay from the waste, as in the case *Ex parte Harrison*? I should think it my duty, and the duty of every commissioner to act conformably to the last decision of the Lord Chancellor, or a court of law; though they might have a confident opinion, as I have here expressed, that the chancellor and the courts of *Westminster hall* would decide differently, if the case were again brought before them. If that was not our rule of action, much confusion would ensue. We may presume to think, but not to act, in opposition to the superior courts.

The principle which we may collect from the judg-

ings thereupon; and such commissions, depositions, and proceedings, in case they can be produced, are not at present of record, nor can be given in evidence, which

ment of the court of King's Bench, in the case of *Sutton v. Weeley*, seems to be this, viz. if a land-owner manufactures the produce of his own estate, and sells it under any shape or form, without the addition and accretion of any other material substance purchased, he is not a trader; as in the case of bricks, nothing is apparently sold, but the burnt clay.

Coals bought for making lime, may be of much greater value than the stone; but yet nothing is apparently sold, but the calcined stone.

Where a man buys corn and sells flour, he both buys and sells an article of merchandize; but if he grows the corn and grinds it into flour, he sells an article of merchandize; but he does not buy any part of the article he sells.

So if a man grows hemp or flax, and manufactures it into ropes or linen cloth, he would not be a trader under the description of the bankrupt statutes, because he does not buy any merchandize, which he sells again: though he may be obliged to purchase many articles of machinery, and also other substances for the amelioration of the produce.

So also, I should think, lead, iron, or any metal produced from the mine, marble or free stone from the quarry, cider from apples, wine from grapes, charcoal from wood, coke from coal, woollen cloth from sheep, leather from cattle, malt from barley, and all similar instances, would not make the manufacturer a trader, if the raw material or original article was the produce of his own land.

But where the article sold, substantially, visibly and sensibly consists of something which he has bought in addition to his own, I should think him a trader; as if a man sold farming implements, consisting partly of wood and partly of iron, as ploughs, spades, &c. if the wood only, or the iron only, was the produce of his own lands, then in respect of the other article, which he buys and sells, I should consider him a trader. So if he manufactured gun-powder from his own charcoal: yet if he bought saltpetre and sulphur, they must be substantially sold again.

may be of very evil consequence to such purchasers, or persons claiming as aforesaid; be it therefore further

A gardener or nurseryman, who sells plants, flowers and seeds, the produce of his own garden, could not be considered a trader; but if he buys pots, and sells the plants and pots together, I think the buying and selling the pots, would make him a trader.

A brewer, who makes beer from the produce of his own barley only, must be obliged to purchase hops; and the particles of the hops are as sensibly perceived in the beer as those of the barley, and probably he would be a trader, who both buys and sells merchandize.

Though that seems to be the broad general principle, yet, as in the case of almost all general rules, the application of it to extreme subtle cases must admit of dispute and controversy.

It has been frequently held the buying personal property, as materials for building, and then selling them, as houses or real property, will not constitute a trading. It is not the trade of merchandize. I have heard Lord Eldon frequently so decide; though the names of the cases are not preserved.

As building theatres, and baths, to sell the shares of them when built is not a trading. Lord Ellenborough said, "a building on a man's own land, for whatever purpose, could not be considered a buying and selling." *Williams v. Stevens*, 2 *Campbell*, 300.

But if a carpenter, bricklayer, painter, &c. is employed in the building or finishing of houses, and he charges for his materials, he is a trader: he sells his articles whilst they are merchandize, it is immaterial to what purpose they are applied.

If a man should buy houses in order to pull them down and sell the materials, he could not be a bankrupt, because he does not buy merchandize; it would no doubt be the same case in principle as buying a coal mine and selling the coals. See *Port v. Tuxton*, p. 331. *ante*.

Having long considered that if either the buying or the selling was of something that at the time of buying or selling was real property, there was not the trade of merchandize, I was much surprized to find that a man was considered a trader, who bought timber *standing and grow-*

enacted by the authority aforesaid, that upon the petition of any person or persons to the lord chancellor, lord keeper, or commissioners for the custody of the great seal of *Great Britain*, praying that such commissions and the depositions taken thereon, or any part of such depositions, and such certificates so to be allowed and confirmed, as aforesaid, or any certificates heretofore allowed

ing, but who sold it when it was cut down. The commission was disputed upon the act of bankruptcy, but no objection was made to this species of trading, though a very learned and discriminating counsel was engaged in the cause, viz. the late Mr. Serjeant Williams. *Holroyd v. Gwynne*, 2 *Taunt.* 176.

But surely the purchase of standing timber or any growing crop or produce, being part of the freehold or realty, must be the same in principle as the purchase of coal in the mine.

It seems to be decided that any buyer and seller of cows, calves, or horned cattle, is a drover and cannot be a bankrupt. In general he will be a farmer and have land of his own to feed his cattle upon; but where he buys and agists them upon the grounds of others till he sells them, or even if he buys at a fair or market, and sells them in the same fair or market, he comes within the description of a drover.

This was decided, after two arguments, in the case of *Mills v. Hughes*, *Willes Rep.* 589. 1745.

In that case the party bought cattle which he agisted upon the grounds of others, and also bought and sold again in the same market, yet it was held he could not be a bankrupt.

The same has lately been decided in the case of *Bolton v. Sowerby*, 11 *East*, 274.

To buy and sell sheep constitutes, I should think, part of the business of a drover. But dealing in pigs, I conceive, is a distinct trade; and that a buying and selling pigs would be a sufficient trade to support a commission.

A salesman is a person to whom cattle are consigned, by the owner, for him to sell to the best advantage; and he is paid so much per cent. He may, no doubt, be a bankrupt, under the character of a broker or factor.

and confirmed, or any other matters or things relating to the said commissions, or the proceedings thereupon, may be entered of record; the lord high chancellor, lord keeper, or commissioners of the great seal, shall and may direct and order such commissions, depositions, proceedings, and certificates, or other matters or things, to be entered of record; and in case of the death of the witnesses proving such bankruptcy, or in case the said commissions, depositions, proceedings, or other matters or things, shall be lost or mislaid, a true copy of the record of such commissions, depositions, or proceedings, or other matters or things, signed and attested as hereinafter is mentioned, shall and may, upon all occasions, be given in evidence, to prove such commissions, and the bankruptcy of such person against whom such commission hath been or shall be awarded, or other matters or things: any law, usage, or custom, to the contrary notwithstanding; and all certificates which have been allowed and confirmed, or to be allowed and confirmed, and entered of record as aforesaid, or a true copy of every certificate, signed and attested as hereinafter is mentioned, shall and may be given in evidence in any of his majesty's courts of record, and be, without any further proof deemed, adjudged, and taken, to be a full and effectual bar and discharge of and against any action or suit, which shall be commenced or brought by any creditor or creditors of such bankrupt, for any debt or demand contracted, due, or demandable, before the issuing of such commission, unless any creditor or creditors of the person that hath such certificate, shall prove that such certificate was fraudulently obtained; in which case costs shall be allowed to either party, as in other common cases. And to the end any creditor or other

person or persons may know where to search, and see whether such commission hath issued, and find what depositions have been taken by virtue thereof, and what proceedings have been thereupon, and whether the said bankrupt hath made such affidavit or affirmation, as aforesaid, and whether such certificates are entered of record, as aforesaid, and all other matters or things which shall be entered of record, in pursuance of this act, the lord high chancellor, lord keeper, or commissioners for the custody of the great seal, shall appoint a certain proper place near the inns of court, where all and every the matters aforesaid shall be entered of record, where ^{Liberty to} all persons shall be at liberty to search and see if the ^{search.} same are duly entered of record; and the lord chancellor, lord keeper, or commissioners, shall by a writing under his or their hands, appoint a proper person, who shall, by himself or his sufficient deputy, to be approved by the lord high chancellor, lord keeper, or commissioners, by a writing under his or their hands, enter of record such commissions, depositions, proceedings, and certificates, and other matters and things, and have the custody of the entries thereof; and also appoint such fee and reward to be paid to such person for his labour and pains therein, as the lord high chancellor, lord keeper, or commissioners, shall think reasonable, not exceeding what is usually paid in like cases; and that the person so to be appointed, and his deputy, shall continue to enter of record, all and every the matters and things aforesaid, and to have the custody of the same, so long as he or they shall respectively behave themselves well in entering the same of record, and keeping such entries, and shall not be removed but by order in writing under the hand of the lord high chancellor, lord keeper, or commissioners, on a good and sufficient cause therein specified; and in case such person shall die, or be, as aforesaid, removed, the lord high chancellor, lord keeper, or commissioners for the

time being, shall and may, in writing, under his or their hands, appoint another person to enter the same of record, who shall have the custody of the entries thereof, and shall have and receive the like fee and reward for his labour and pains. (41)

(41) This section was first introduced by the 5 Geo. 1. c. 24, sect. 30. The office of the clerk of inrolments cannot therefore be more ancient than that statute. It appears in fact not to be more ancient than this, or that the first clerk of inrolment was appointed by Lord Chancellor King in 1732.

The officers in the bankrupt office are the secretary of bankrupts; the clerk of inrolments originating from this section, and the patentee and his deputy appointed in consequence of the first bankrupt statute, the 13 Eliz. c. 7.

A concise and clear account of these three officers is given in Davies's Laws relating to Bankrupts. It is the presentment of the gentlemen who were appointed to examine into the nature of several offices in the law, and the fees thereto belonging.

An extract from that inquisition respecting each of them will probably be thought to afford useful information.

It appears that the secretary of bankrupts is appointed by the lord chancellor, &c. by parol, takes no oath of office, and is removable at pleasure. They also found that this is an ancient officer, and that his duty is to lay before the lord chancellor, &c. the affidavits, petitions, and bonds upon which commissions of bankrupts are to be founded, and to write his lordship's orders upon such petitions, to enter them in books kept for that purpose, and to attend his lordship in court on hearing all petitions relating to bankrupts, and to draw up and to enter the orders thereon, and to attend his lordship in turn with other his secretaries. *Dav. 146.*

The clerk of the inrolments is appointed by virtue of this statute.

“ An appointment under the hand and seal of the late Lord Chancellor King, dated the 10th day of August, 1732, was produced to the jury, whereby, in pursuance of the said act, his lordship appointed the office or dwelling-house of Vigerus Edwards, Esq. (then clerk of the

42. And whereas the suing out and prosecuting of Clause to prevent unnecessary expences.

inrolments) in Shire Lane, to be the place where all commissions of bankruptcy, depositions, proceedings, and certificates, and other matters and things aforesaid, should be entered of record; and thereby appointed the said Mr. Edwards to be the person to enter of record all such proceedings, to hold the said office by himself, or his sufficient deputy, to be approved by the lord chancellor, &c. so long as he shall behave himself well; and the said Lord King in pursuance of the said act, appointed the fees therein specified as reasonable fees, and directed a table of them to be *hung up in the said office.*" *Dav.* 149.

Of the patentee and his deputy.

"As to this officer, the jury presented, that they find by several statutes, particularly in one made in the thirteenth year of Queen Elizabeth, commissions were directed to be issued by the lord chancellor, lord keeper for the time being, appointing such persons as to him should seem good, to take order concerning bankrupts bodies, lands, and goods.

"And that in the fortieth year of Queen Elizabeth there was then a clerk for writing commissions of bankrupt.

"And they find, that on the 14th of February, in the fourteenth year of King James 1st, a patent issued under the great seal, a copy whereof was produced and proved unto them, appointing Arthur Maynwering, Esq. and Nicholas Archibold, or their deputy, to execute the office of the execution of the laws and statutes concerning bankrupts, which is the first grant of this office, that appeared to the jury; and they find that the same is an ancient office necessary for the execution of the laws and statutes concerning bankrupts.

"They find that no officer, clerk, nor minister, other than the officers appointed by letters patent, or their immediate deputy, do or of right ought to belong to this office; and that the service, charge, and attendance of this officer, is to write, engross, and procure to be passed, by and under the great seal, all commissions, writs of supersedeas, procedendo, and all other writs and things incident and necessary to the due execution of the law against bankrupts, and to attend at the office every day, Sundays and Christmas days excepted." *Dav.* 150.

commissions of bankrupt is at present very expensive, to the great prejudice of the bankrupt and his creditors; be it further enacted by the authority aforesaid, that there

Under this section no part of the proceedings are recorded, unless a petition is presented by some one for that purpose, and the petitioner pays the fees for having them copied. This clause, therefore, is of very little general public benefit.

I have long thought it a great defect in the system of the bankrupt law, that there is no provision, by which the creditors are enabled to know the state of the transactions under the commission at any time by one comprehensive or intuitive view.

At present they are kept quite in the dark, or with great difficulty they can obtain the knowledge they wish or ought to obtain.

To remedy this deficiency I should recommend an abstract of all the public proceedings in bankruptcy to be made and kept in the bankrupt office for the inspection of the public, like the register of wills in the prerogative office.

In this abstract or register might be entered the name, residence, and trade of the bankrupt; the name and residence of the petitioning creditor, the amount of his debt; the names of the commissioners and of the solicitor to the commission.

Also the name and residence of every creditor, and the amount of the debt each has proved at the first meeting.

In like manner all the debts proved at the second meeting, the names and residence of the assignees, and where they are to place the money arising from the bankrupt's property.

Then the debts proved at the third meeting, and a statement of the bankrupt's property.

When the first dividend is made, the receipts and payments of the assignees, the dividend ordered upon the balance in hand, the sum retained in their hands, and the reason assigned for it to be afterwards entered.

And thus the abstract to be continued till there is a final dividend.

If such a book as this were kept under every commis-

shall not be paid or allowed by the creditors, or out of the estate of the bankrupt, any monies whatsoever for expenses in eating and drinking of the commissioners, or of any other persons, at the times of the meetings of the said commissioners, or any of the creditors: and that no schedule shall be annexed to any deed of assignment of the personal estate of such bankrupt from the com-

Irish stat.
sect. 52.

sion in a methodical manner for public inspection, every creditor would have an opportunity of informing himself at once of the exact state of the proceedings under the commission: at present it lies involved in a great roll of papers, which are seldom unfolded so as to be intelligible to any human being, (the commissioners and professional men only excepted,) and which from their confused chaotic form may be the cause of great error and great fraud.

By this plan publicity, fairness, and perspicuity would be introduced into every stage of the proceeding, and every part of that important business would be intelligible to all persons interested, whatever might be their station or capacity. It would furnish a perpetual record of each commission, which might be resorted to for years after the date of it.

The fee of 1s. from each person, who shall inspect this public register, I should think would amply repay the clerks at the bankrupt office for their trouble and loss of time in making the abstract, and keeping it properly arranged for the use of the public.

By this section the chancellor, upon the petition of *any persons*, may order the commission, depositions, &c. or *other matters or things to be entered of record*. Whenever, therefore, such a plan meets with the approbation of the lord chancellor, it might be modified and regulated by him as he pleased, without calling in the aid or interference of the legislature.

From the communications I have had with many respectable merchants, I cannot but think that the adoption of this plan, and the introduction of such a register would give universal satisfaction.

missioners to the assignee or assignees of the said estate; and if any commissioner or commissioners in any commission, shall order any such expence to be made, or eat or drink at any such meeting, at the charge of the creditors, or out of the estate of such bankrupt, or receive or take above the sum of twenty shillings each commissioner, for each respective meeting, every such commissioner, so offending, shall be disabled for ever to act as a commissioner in such or any other commission found on this act, or any of the statutes made concerning bankrupts. (42)

(42) The schedule annexed to the assignment is here introduced in a very extraordinary manner. Before the assignees were made elective by the creditors by the 5 *Ann. c. 22. s. 4.*; to which assignees the commissioners were to assign all the estate and effects, the commissioners appointed the assignees, and might assign some of the debts and effects to one assignee, and some to another.

It therefore was then a convenient practice to annex a schedule to the assignment of the particular debts and effects, which the particular assignee was empowered to receive. Nothing before this time having been declared by the legislature to put a stop to that practice, it is introduced here with no apparent connection with the rest of the section, except that it was thought productive of unnecessary trouble and expence.

The rest of this section is copied from the 5 *Geo. 1. c. 24. s. 13.* which first allowed each commissioner twenty shillings for each meeting. That statute also allowed each commissioner the same fee for executing a deed, though that allowance is not mentioned here: it is still received by the commissioners. Ten shillings were allowed them for the warrant of seizure, which are still received by some commissioners in the country, though never in London.

Never more than three commissioners attend, and receive fees; a practice which probably originated from a recommendation or regulation of the great seal.

This section is very peremptory with respect to eating

43. Provided always, and be it further enacted by the authority aforesaid, that the said commissioners, authorized as aforesaid, and every of them, shall not be capable of acting as a commissioner or commissioners, in the execution of any of the powers and authorities given and granted by this present act, or any other act or acts of parliament now in force concerning bankrupts, after the twenty-fourth day of *June*, one thousand seven hundred and thirty-two (unless it be the power hereby given of administering oaths to commissioners) until such time as he and they respectively shall have taken an oath to the effect following; that is to say,

I A. B. do swear, That I will faithfully, impartially, Commissioner's oath.

and drinking at the expence of the bankrupt's estate. In London it is never heard of, or thought of.

Lord Hardwicke removed all the commissioners and assignees "for taking more than 20s. a piece at each meeting, and likewise ordering great sums of money to be charged for their eating and drinking."

He ordered all the proceedings in that commission to be stayed, and that five other gentlemen should be appointed by a renewed commission, that they should proceed to the choice of new assignees, and that the old assignees and three of the former commissioners should join with the new commissioners in executing an assignment to the new assignees, and that the former assignees should pay over to the new assignees all the bankrupt's effects, which had come to their hands. *Ex parte Halliday, 7 Vin. Abr. 77.*

The chancellor without question could supersede the commission, and vacate the assignment; the only questionable part of the jurisdiction in that case exercised, is whether he could have compelled the commissioners removed to join with the new commissioners. But it was a part of the order, which did not seem necessary, and which was not likely to be resisted.

and honestly, according to the best of my skill and knowledge, execute the several powers and trusts reposed in me, as a commissioner in a commission of bankrupt against
and that without favour
or affection, prejudice or malice. So help me God." (43)

A memorial
thereof to be
registered.

44. Which oath any two or more of the said commissioners are hereby impowered and required to administer to each other in the same commission named and authorized; and they the said commissioners shall and are hereby required to enter and keep a memorial or memorials thereof, signed by them respectively, among the depositions and other proceedings on each respective commission that shall be issued forth by virtue of this act, or any other act or acts of parliament now in force concerning bankrupts. (44)

(43) The oath of the commissioners was first introduced by the 5 Geo. 1. c. 24. sect. 32.

When three of the commissioners have notice to attend at a private meeting, the time and place being previously fixed by themselves, so as to accommodate the witnesses summoned to prove the debt, trading and act of bankruptcy, the first step is to *open* the commission, to see that it is directed to them, and then each commissioner *qualifies* himself to act under the commission, by taking the New Testament, and repeating himself the words of the oath.

The commissioners swear that they will act *according to the best of their skill and knowledge*. In a preceding note, p. 336, ante, I have stated that the skill and knowledge of the commissioners ought to be a knowledge of the last decision upon the subject, or the last opinion of a chancellor or judge upon it, delivered publicly from the bench; for it would produce infinite confusion, if every three commissioners were to act according to their notions of law in opposition to the judgments of the chancellor or judges.---If this rule were not strictly adhered to, there would be no consistency even in the proceedings under the same commission.

(44) The qualification of the three first commissioners is filed with the proceedings, and when either of the

45. And be it further enacted by the authority afore-^{Commissions not to abate by the death of his majesty, &c.} said, that no commission of bankrupts shall abate by reason of the death of his present majesty (whom God long preserve) his heirs or successors, but such commissions shall continue in full force; and if it shall be necessary^{Irish stat. sect. 15.} to renew any such commission by reason of the death of the commissioners named in such commission, so that a sufficient number of commissioners shall not be living who can act therein, or for any other cause, in every such case such commission shall be renewed, and but half of the fees usually paid upon granting or obtaining of commissions of bankrupt shall be paid for any such renewed commissions. (45)

46. And to the end that commissions of bankrupt may^{Bills of fees, &c. to be settled by a master in chancery.} be carried on and prosecuted with as little expence as reasonably may be, be it enacted by the authority afore-^{said,} that all bills of fees or disbursements claimed or demanded by any solicitor, clerk, or attorney employed

other two begins to act at any subsequent time, he takes the same oath, and subscribes the memorandum, and the other two write their names in the margin. See the forms.

(45) The commission abates if the bankrupt dies, before the commissioners meet, and qualify, but not otherwise; *see p. 37 ante.*

This section provides for the demise of the crown, and for the death, inability or removal of the commissioners.

See note to sect. 42, where it is stated that Lord Hardwicke ordered a commission to be renewed for the misconduct of the commissioners. This is a *cause* for which the chancellor has such a power by this section.

The new commissioners added to the former commissioners, (if any remain) are called *tam quam* commissioners; and when they have qualified, they act upon the former proceedings as if they had been named originally.

Irish stat.
sect. 16.

under any commission of bankrupt, shall be settled, adjusted, and certified by one of the masters of the court of chancery; and so much as the master shall certify to be due to such clerk, solicitor or attorney, and no more, shall be paid by the assignee under such commission; and the master who shall settle and adjust such bill, shall have and receive for his care in settling and adjusting the same, as also for his certificate thereof, the sum of twenty shillings, and no more. (46)

Certificates of
bankrupts be-
fore 14 May,
1729, on con-
formity, con-
firmed;

47. And whereas several bankrupts have either through inadvertency, or the intricacy and multiplicity of their

(46) By sect. 25 the costs of the commission, including the choice of the assignees, are to be ascertained by the commissioners; and it should seem that all other bills claimed by the solicitors were to be settled by a master in chancery.

The legislature probably contemplated that the solicitor would be employed by the assignees in bringing actions at law and suits in equity, and that the commissioners though barristers, were not by their professional experience competent to adjust such charges.

But this section produces much inconvenience, if it is thought to apply to every bill, though only for the ordinary attendance at Guildhall, because upon the charges of each day, there can be no variation. It is probable that these regular charges were not intended to be included under *bills of fees and disbursements*.

It is the general practice to admit such bills. I should therefore think, though I speak with diffidence, that commissioners may admit a bill containing only the regular charges for attendance at Guildhall, but that all bills for business done for the assignees, as between attorney and client, ought in no instance to be allowed till they are taxed by a master.

The solicitors always complain that upon a bill taxed, however trifling the sum, instead of the 20s. they are obliged to pay many pounds.

affairs, failed to obtain, within the time limited, certificates allowed as directed by a clause in an act passed in the third year of the reign of his present majesty (amongst other things) for relief of bankrupts whose certificates were not allowed before the expiration of a late act for the better preventing frauds committed by bankrupts, now expired, notwithstanding they have discovered all their estate and effects, and delivered the same up for the benefit of their creditors, and been conformable unto the said act in other particulars; be it therefore further enacted by the authority aforesaid, that all and every bankrupt and bankrupts who was or were declared a bankrupt or bankrupts on or before the fourteenth day of May, one thousand seven hundred and twenty-nine, and have discovered all their estate and effects, and have delivered up the same for the benefit of their creditors, shall be entitled to all and singular the relief, benefit, and advantages, and be subject and liable to all the penalties mentioned or contained in the act of parliament passed in the fifth year of the reign of his late majesty king *George the first*, entitled, *An act for the better preventing frauds committed by Bankrupts*, if they already have obtained, or shall hereafter at any time before the twenty-fifth day of *March*, one thousand seven hundred and thirty-three, obtain certificates of their conformity pursuant to the said act; and such certificates shall be allowed and confirmed as the said act directs: any thing herein contained to the contrary notwithstanding.

48. And whereas actions may have been brought and proceedings against such bankrupts, and other proceedings had against them discharged thereon for causes and matters arising and growing due before the time of the bankruptcy of such bankrupts, be it further enacted by the authority aforesaid, That all such actions, and all proceedings thereon for any such causes or matters, shall be and are hereby discharged

against such bankrupts and their bail, so obtaining such certificates allowed as aforesaid.

Duration of
this act.

49. And be it further enacted by the authority aforesaid, That this act shall continue and be in force for the space of three years, from the twenty-fourth day of *June* one thousand seven hundred and thirty-two, and from thence to the end of the then next session of parliament, and no longer.

Made perpetual by 37 Geo. 3. 120.

Anno 19 Georgii 2. cap. 32. 1746.

AN ACT FOR AMENDING THE LAWS RELATING TO BANKRUPTS.

Preamble.

Sect. 1. WHEREAS many persons within the description of, and liable to the statutes concerning bankrupts, frequently commit secret acts of bankruptcy unknown to their creditors and other persons, with whom, in the course of trade, they have dealings and transactions; and after the committing thereof, continue to appear publicly, and carry on their trade and dealings, by buying and selling of goods and merchandizes, drawing, accepting, and negotiating bills of exchange, and paying and receiving money on account thereof, in the usual way of trade, and in the same open and public manner, as if they were solvent persons, and had not become bankrupt: and whereas the permitting such secret act of bankruptcy to avoid and defeat payments, really and *bona fide* made in the cases, and under the circumstances above mentioned, where the persons receiving the same had not notice of, or were privy to such persons having

committed any act of bankruptcy, will be a great discouragement to trade and commerce, and a prejudice to credit in general: be it therefore enacted by the king's most excellent majesty, by and with the advice and consent of the lords spiritual and temporal, and commons, in this present parliament assembled, and by the authority of the same, that from and after the twenty-ninth day of *October*, 'in the year of our Lord one thousand seven hundred and forty-six, no person who is or shall be really and *bonâ fide* a creditor of any bankrupt, for or in respect of goods really and *bonâ fide* sold to such bankrupt, or for or in respect of any bill or bills of exchange really and *bonâ fide* drawn, negotiated, or accepted by such bankrupt, in the usual and ordinary course of trade and dealing, shall be liable to refund or repay to the assignee or assignees of such bankrupt's estate, any money which, before the suing forth of such commission, was really and *bonâ fide*, and in the usual and ordinary course of trade and dealing, received by such person of any such bankrupt, before such time as the person receiving the same shall know, understand, or have notice that he is become a bankrupt, or that he is in insolvent circumstances.' (1)

After 29 October, 1746.

Creditors of bankrupts not liable to refund to the assignees

monies received before notice of insolvency, &c.

(1) This is a most important chapter in the bankrupt law. It is the third qualification made by the legislature of the 13 *Eliz.* which introduced the severe law that depends upon what is called the relation to the act of bankruptcy.

Unfortunately Lord Hardwicke in delivering a judgment called this a *fiction*, which has prevented it from being properly understood, see p. 305, *ante*.

I shall, therefore, concisely state the history of it, and the cases decided under this statute in which there is a considerable degree of contradiction and confusion.

By the 13 *Eliz. c. 7. s. 2.* the commissioners had power to grant and sell all lands, money, goods, and debts of the bankrupt, which he had in his own right *when he became a bankrupt*, and such grant shall be good against all

Obligees in bottom-ree or respondentia contracts admitted to claim.

2. And whereas merchants, and other traders, frequently lend money on bottom-ree, or at respondentia,

persons claiming by any act done after such person shall become bankrupt.

Here then is a complete incapacity in the bankrupt from the moment of the act of bankruptcy to dispose of any of his property or to receive his debts.

The 11th section of the same original statute gives the commissioners the same power over all *lands, goods, or chattels, which by any means shall come to any person being bankrupt before his debts shall be satisfied.*

This is no fiction, but the fullest and plainest declaration of their intention, that the two houses of parliament ever made.

The incapacity of the bankrupt to dispose of what he possessed, or to receive his debts, relates back to the act of bankruptcy, and the commissioners power to dispose being co-extensive as his inability, also relates back to that act.

And in the 31st of Elizabeth before there was any other statute, it was adjudged by Wray Chief Justice and the whole court, that the vendee of the commissioners might recover in trover the goods of the bankrupt which he had in his possession at the time of the act of bankruptcy, though he had disposed of them before the sale of the commissioners. *Case of Bankrupts*, 2 Co. 25. 1589.

Till the 5 Ann. c. 22, s. 4, when the commissioners were directed to convey all the property of the bankrupt to the assignees chosen by the creditors, they might have made a separate vendee or assignee of every separate article of the bankrupt's property, and the assignees have now the same right to recover every article of the bankrupt's property, as if they had been originally the special vendee of it. Hence we say that the assignees have a right to all the bankrupt's property by relation to the act of bankruptcy.

After the 13 Eliz. if a debtor had paid the bankrupt what he owed him, without any knowledge of the act of bankruptcy, if a commission at any time followed, the vendee of the commissioners might have compelled the debtor to pay again the debt to him, as the bankrupt

and in the course of their trade frequently cause their ships or vessels, and the goods and merchandizes loaden

had no more right to receive that debt than any other man.

This began to be thought hard, as the debtor to the bankrupt was not only obliged to pay the debt a second time, but he could have no remedy under the commission for what he had so honestly paid to the bankrupt. This hardship was relieved by the next statute, 1 Jac. c. 15, s. 14. See p. 34, *ante*.

It was afterwards thought hard if any one had bought goods or any real property of the bankrupt and had honestly paid for them, without any knowledge of the act of bankruptcy, that the vendee of the commissioners might, after any distance of time, recover that property or its value from the purchaser, and the purchaser could have no remedy under the commission for the purchase-money, which he had *bona fide* paid.

This hardship was in some degree diminished by the 21 Jac. 1. c. 19. s. 14, which restrains this power of the vendee or assignee of the commissioners, and only permits the property sold to be recovered, when a commission is sued out within five years after the act of bankruptcy. See p. 45, *ante*.

These are the only two legislative qualifications of the incapacity of the bankrupt before this statute.

But there had been a qualification by the courts of law which it may be proper to mention here before I proceed to the consideration of this statute.

The legislature had given no protection to any person who received property from the bankrupt, or who had paid what was due to him, after a known act of bankruptcy.

The first and only protection we find in that case is introduced by the judges, viz. when any one is compelled by an action to pay the bankrupt a debt due to him.

The first case we find is as follows, viz.

In assumpsit, the defendant pleads that after the promise, and before the action, the plaintiff became a bankrupt, denying himself to creditors, of which the defen-

thereon, to be insured; and where commissions of bankruptcy have issued against the obligor in such bottom-ree;

dant had notice, to which, the plaintiff demurred, and *per curiam* payment to bankrupt after notice is void; but if no notice, or if the party be compelled by suit, as here before any commission sued out, it is a good discharge. *Pryn v. Beale*, 3 *Keb.* 231. 1672.

And in the same book upon a similar plea and demurrer the court said it was an ill plea. *Andrews v. Spicer*, 3 *Keb.* 616. 1674.

Though these are leading cases upon this important point, yet the court have been sparing of their reasons, or in fact have given none whatever.

But in an action on an account stated, to which the general issue was pleaded, and a verdict for the plaintiff; it was moved to set aside the verdict, and to enter a nonsuit, because the plaintiff before the action brought, had committed an act of bankruptcy known to the defendant.

Mr. Justice Ashhurst observed, if this objection were to prevail, it would equally hold at any distance of time, though it were never in the contemplation of any creditor to sue out a commission. But I think that apart from that consideration, it does not lie in the defendant's mouth to make the objection. Where a person pays voluntarily with notice of the bankruptcy, then the rule holds, but not where he pays by the coercion and judgment of a court of law.

Mr. J. Buller observed, the assignees can only recover where the payment has been voluntary, and with notice; but in the present case, there has been no commission, no docket was struck, neither was there any intention to sue out a commission, and the defendant will not be considered to have paid this demand voluntarily. If indeed there was any fraud by the defendant's colluding with the bankrupt in suffering a judgment to be recovered against him, that would be a different case. *Foster v. Allanson*, 2 *T. R.* 479. 1788.

Here the reasons are satisfactory, and this point seems to be at rest.

But I should think the defendant need not suffer a judgment to be recovered against him as mentioned by the judges, and incur all the costs of the action, which

or respondentia bond, or the underwriter or assurer in such assurance, before the loss of the ship or goods, in

might be many times the debt : it would surely be a sufficient protection, if he paid after being served with any legal process.

This discharge of the debtor by the commencement of an action seems to be most reasonable and equitable, for if the creditors will not use due diligence to sue out a commission, in consequence of which the debt would be payable to them, they may be considered as authorising the bankrupt to recover it.

But if this statute had never been passed, it may be proper to consider what would be the effect, if the creditor of the bankrupt had recovered his debt from him after a secret or known act of bankruptcy by an action at law.

The bankrupt could make no defence against the action ; and if he pays the debt, he pays it with the money which the statute gives to the commissioners or their assignees, even if he pays it to liberate his person from execution. And the money of the assignees being so paid, there seems to be no reason to make a distinction between a voluntary and a compulsory payment.

If the creditor by the sheriff takes the debtor's goods in execution, the assignees have precisely the same remedy as any other person would have, whose goods the sheriff had taken instead of the bankrupt's.

A compulsory process against the bankrupt after bankruptcy, and before the commission, is therefore quite different in its effect from a compulsory process by the bankrupt. I have thought it proper to state this, from an apprehension that they have been confounded together.

This statute by the first section intended to protect traders, or those who had dealings with a trader after a secret act of bankruptcy, in two instances only, viz. first, when he received money in respect of goods *bonâ fide* sold to him in the usual and ordinary course of trade, and which was *bonâ fide*, and in the usual and ordinary course of trade received of the bankrupt; secondly, or in respect of a bill of exchange *bonâ fide* drawn, negotiated, or accepted by the bankrupt in the usual and ordinary course of trade, and which was *bonâ fide* and in the usual and ordinary course of trade received of the bankrupt.

admitted to have any benefit or dividend under such commission, which may be a discouragement to trade :

neither could it be in the present." *Pinckerton v. Marshall*, 2 Hen. Bl. 334. 1794.

A question might have been made in this case, which does not seem to have been considered, whether every bill of exchange drawn for any consideration in the usual and ordinary course of trade, that is, in the stile and manner of mercantile bills, is not within the statute. But the court seem to have thought that the bill must have been given for goods sold in the course of trade.

See further considerations upon this subject in the sequel of this note.

Where goods were consigned and delivered after a secret act of bankruptcy as a security for money advanced, Lord Kenyon and the court held clearly that the assignees might recover them or their value. *Copland v. Stein*, 8 T. R. 199. 1799.

This statute was mentioned in the argument, but the case had no reference to it.

It properly belongs to the 21 Jac. 1. c. 19. s. 14. as the commission was sued out within five years after the act of bankruptcy.

In the next case. In an action by the assignees against the defendant, who had arrested the bankrupt as the acceptor of a bill of exchange, upon which the bankrupt immediately paid the amount, the question was for the opinion of the court, whether the defendant had a right to retain it under this statute, he having received it at the time without notice that the bankrupt had committed an act of bankruptcy, or was in insolvent circumstances.

Mr. J. Chambre made a very able argument to prove that this was not a payment in the usual and ordinary course of trade, as required by the statute: he observed that "the nature of the debt in the case before the court is not denied to be such as the statute describes; but is the mode of payment such as the statute requires? Was this a payment in the usual and ordinary course of trade and dealing? Are sheriff's bailiffs the persons who transact the affairs of merchants and traders in the ordinary course of trade and dealing?"

For remedy whereof be it enacted by the authority aforesaid; That from and after the said twenty-ninth

“ If this will do where are we to stop ?

“ This is a case where payment has been made under an arrest, but why stop there ? But will not the argument go equally to protect payments after suing out execution ? If indeed the sheriff seizes and sells the effects, that may not be considered as a payment by the party ; but I can find no difference between the present case and cases where the bankrupt pays the money to prevent the seizure, or even to redeem his person after he is taken upon the *ca. sa.* ; and payments under all these circumstances, we are desired to consider as made under appearances of perfect solvency on the part of the bankrupt, and in the ordinary course of trade.”

Mr. J. Rooke was of a different opinion, and seemed to go the length that all payments obtained by coercion from the bankrupt were protected, like payments made to the bankrupt after notice of bankruptcy by legal compulsion.

But Mr. J. Heath confined his reasoning to the cases within the statute, payment for goods sold, and upon a bill of exchange ; he said, “ in order to give validity to the payment of a bill of exchange, it must be drawn, and the money received in the ordinary course of trade. In my apprehension this bill had both requisites. Of the considerations of the bill there is no question. The bill was due before it was paid, and it was not officiously paid by the bankrupt. The objection is that the payment was made under the terror of an arrest. The maxim *vigilantibus et non dormientibus succurrunt jura* is one of those that we learn on our earliest attendance in Westminster Hall.

I am of opinion as well upon the general policy of law, that favours the legal diligence of creditors, as on the particular policy of the bankrupt laws, that this is a good payment, and protected by the stat. of 19 Geo. 2. If the case were doubtful, the decisions ought to put an end to the controversy.” Judgment for the defendant. *Cox v. Morgan* 2 B. and P. 398. 1801.

The Chief Justice was absent.

day of *October*, the obligee in any bottom-ree, or respondentia bond, and the assured in any policy of in-

In the next case the bankrupt was arrested and sent to the King's Bench prison, having then committed an act of bankruptcy; and whilst he was in prison, he was charged with several other actions: being so circumstanced, he sent for the defendant, who had arrested him, and all the persons by whom he was detained except one, and paid them all the full amount of their debts; but no other circumstance occurred, from which it could be presumed that the defendant knew of the bankruptcy or insolvency of the bankrupt at the time he received his debt.

Lord Alvanley and the court held this case was quite different from the former one of *Cox v. Morgan*, "that it was perfectly clear, that the only rule there laid down is that if a man, who is arrested by a creditor, *bona fide* using legal diligence for the recovery of his debt, pay that debt in order to relieve himself from that arrest, and without any intention of giving a preference to the creditor by whom he is arrested, such payment will be protected by the 19 Geo. 2."

The court were quite clear and confident from what they observed that it must have been received with a knowledge of his insolvency. But the bankrupt lay in gaol so as to commit an act of bankruptcy upon that arrest; they therefore received payment after a known act of bankruptcy. *Southey v. Butler*, 3 B. and P. 237. 1802.

Nothing seemed to be gained in that case; except what may be considered as material, that a limit was fixed to the case of *Cox v. Morgan*.

In the next case the defendant after a secret act of bankruptcy had proceeded in the Mayor's court of London, and had regularly by a foreign attachment, according to the custom of London, obtained from Mr. De Beame 367*l.* the money of the bankrupt.

A commission afterwards issued against the bankrupt, and his assignees brought an action of assumpsit for this money.

The question was whether it was a payment protected by this statute.

insurance, made and entered into upon a good and valuable consideration, *bond fide*, shall be admitted to claim; and

Lord Ellenborough in giving judgment observed, " if it had been necessary to have decided the question on which the court of Common Pleas were divided in opinion, in the case of *Cox v. Morgan*, I should have wished to have taken more time to consider it, especially as the opinion of the majority of that court is fortified by antecedent cases; though I confess that at first sight of the statute, I should be more inclined to the construction put upon it by the single judge. But there is no necessity for us to determine whether that case were rightly decided by the majority. For whether or not money received by a creditor under the compulsion of process, can or cannot be said to be received by him in the usual and ordinary course of trade and dealing, at least it must be received *of the bankrupt*, to bring the case within the statute; the payment must be made by the bankrupt, or if not by his individual hand, at least by some agent of his, acting by his authority. But how can a payment, extorted by compulsion of legal process, from one who happened to have effects of the bankrupt in his hands at the time, be said to be a payment by the bankrupt, who was not even conscious of the fact? Therefore without going more at large into the question, it is sufficient to dispose of this case by saying that it neither comes within the words nor the meaning of the statute." *Hovill v. Browning*, 7 East. 154. 1806.

In the next case, the bankrupt had given the defendant a promissory note upon a balance of an account, part of which was for money lent. The note was payable at twelve months, and not being then paid, the bankrupt was arrested, and a judgment was recovered and affirmed on error. Upon this the bankrupt paid the defendant his debt and costs, but he had previously committed an act of bankruptcy unknown to the defendant.

Lord Ellenborough said, " that even considering a promissory note to be within the statute (on which, however, no opinion was given) the note in question having been originally given on the account now stated, could not be said to have been given in the ordinary course of trade

after the loss of contingency shall have happened, to prove his; her, or their debt and demand, demands in

and dealing." Judgment for the plaintiffs, the assignees. *Harwood v. Lomas*, 11 *East*, 127. 1809.

With respect to the question whether this statute applies to promissory notes, I think it may be observed that the words seem to be cautiously selected to confine it only to bills of exchange. The bill must be either drawn, negotiated, or *accepted* by the bankrupt. The same thing which is drawn must be capable of *acceptance*.

Where the legislature in the bankrupt statutes have meant both, they have expressed both, as in 5 *Geo. 2. c. 30. sect. 11.* where every bond, *bill, note, &c.* are expressed.

Besides it is contrary to the usual course of trade for merchants and traders to give promissory notes. They do not mend the security, and they imply a discreditable requisition for further time.

For these reasons I think it probable that the payment of a promissory note by a bankrupt will never be held to be protected by this statute, unless it should be considered as payment of money for goods sold.

In an action for money had and received to recover the sum of 324l. paid by Visick, the bankrupt, to the defendants after an act of bankruptcy.

The defendants were bankers, who had drawn bills for the accommodation of Visick the bankrupt; after he had committed an act of bankruptcy, he had remitted that sum to the bankers to take up the bills which were not then due.

First, it was contended this might be set off against what the bankrupt owed them.

Lord Ellenborough. "The money not being paid in till after an act of bankruptcy, it was not the bankrupt's money, but the money of his assignees. He trusted the defendants with what was not his own.

"The statute is expressly confined to mutual credit and mutual debts at any time before such person became bankrupt.

"The 324l. was always a debt due to the assignees,

respect of such bond or policy of insurance, in like manner as if the loss or contingency had happened

and cannot be set off against a debt due from the bankrupt."

It was then contended that this was a payment under this statute.

Lord Ellenborough. "I doubt whether these bills can be said to have been drawn in the course of trade and dealing within the meaning of the statute. At any rate, as the bills were still running at the date of the commission, this money was not received by the defendants in the usual and ordinary course of trade and dealing. The payments protected are payments upon bills actually due. The sum in question was deposited with the defendants, not in payment of a present debt, but to satisfy a demand which did not arise till after the suing forth of the commission."

Verdict for the plaintiffs, which was afterwards confirmed by the court of King's Bench. *Tamplin v. Diggins*, 2 *Campb.* 312. 1809.

This is said to have been confirmed by the court of King's Bench. It is not in East's Reports--the court probably refused a rule to shew cause.

I have now considered in order all the cases, except two which I have reserved for the conclusion of my observations upon this statute. It is not yet so explained, but probably several others may still be brought before the courts of law for their consideration and decision.

I have stated before, that the first words, *in the usual course of trade*, though they immediately follow the bill of exchange seem to be equally applicable to *goods sold*--so that the goods must be both sold and paid for in the course of trade and dealing. The words *and dealing* seem to be superfluous.

But nothing has yet been decided, whether the goods are to be such as the bankrupt trades with, the seller trades with, or they both trade with.

I should think if a gentleman unconnected with trade, sold a horse, or corn to a dealer in horses or corn, they would be goods sold in the course of trade; or if a shopkeeper sold the articles he dealt in to be consumed by the

before the time of the issuing of the commission of bankruptcy against such obligor or insurer; and shall be

bankrupt's family, those would be goods sold in the course of trade. But if an article was bought by the bankrupt, which neither he nor the seller dealt in, it could not come under that description; as if a gentleman sold a merchant a horse for his private use, if he received payment after a secret act of bankruptcy, the payment would not be protected.

It seems to have been considered by Lord Ellenborough and the court of King's Bench, in the case of *Harwood v. Lomas*, 11 *East*, and by the court of Common Pleas, in *Pinckerton v. Marshall*, 2 *Hen. Bl.* 334. See ante in this note, that the bill of exchange must be given for goods sold in the course of trade.

The last case negatived the validity of the payment of a note given for money lent, and the former a bill of exchange accepted for a verdict obtained for freight.

It is quite clear that the payment of money for freight would not be a payment for goods sold. But may it not be thought that for such a mercantile transaction, if the debtor gave the creditor leave to draw upon him by a bill at future day, which he regularly accepted, after he had committed a secret act of bankruptcy, and the bill had been negotiated through several hands, and then paid to the holder when due, would not this bill of exchange both be accepted and paid in the usual course of trade?

If the bill of exchange was only to be drawn, negotiated, or accepted, by the bankrupt for goods sold in the course of trade, the introduction of it into the statute would have been superfluous and nugatory; for if a bill or note is honoured afterwards when it is due, it is considered as the payment of so much money at the time it is given, that is at the time it is drawn, indorsed, or accepted.

That is clearly laid down by Lord Hardwicke in a case upon this statute, though the decision is otherwise confused and erroneous.

The defendant had received a sum of money from the plaintiff to discharge a debt with, which he applied to his own use. It was therefore a debt of so much money to the plaintiff.

entitled unto, and shall have and receive a proportionable part, share, and dividend of such bankrupt's estate, in

He committed a secret act of bankruptcy, and then indorsed two bills of exchange to the plaintiff, upon which the plaintiff received the money, the amount of the debt due to him.

Lord Hardwicke said, "I take the putting the bills of exchange into the plaintiff's hands to be done to make satisfaction for the money on the bond. If this money was received by the plaintiff from the defendant, before such time as the plaintiff had notice of the act of bankruptcy committed, it was a good payment, for there is an express *proviso* in the act of parliament, which indemnifies creditors in receiving money for their debts, though after an act of bankruptcy, if no notice, provided the money was received on them before the commission of bankruptcy issued: for I should take that as only a *medium* of payment and no more; and otherwise it would be very hard." *Hawkins v. Penfold*, 2 Ves. 550. 1754.

Lord Hardwicke here did not advert to the words of the statute, that the payment must be for *goods sold in the course of trade*. So that the payment at the time of so much money would not have been good. But Lord Hardwicke is clear, that if the payment of money would have been good, the payment by the indorsement of bills was good and protected by the statute. The case states he indorsed the bills; of course the payment of them when due was not made by him.

Lord Kenyon and the court of King's Bench have held that payment by a bill of exchange, afterwards honoured is the same as payment by money.

Casey was indebted to Cann for having sold goods for him as a factor; after Cann had committed a secret act of bankruptcy, Casey accepted bills drawn by Cann to the amount of the debt, which he afterwards paid. An action was afterwards brought by Cann's assignees against Casey to recover again this debt.

Lord Kenyon, C. J. "This is as clear a case as can be stated. If we had an election given us for the first time to put either a rigid or liberal construction on the statute of James, I should not hesitate to say that we ought to put a liberal construction upon it; for the object of it was

proportion to the other creditors of such bankrupt, in like manner as if such loss or contingency had happened

to protect certain payments made to a bankrupt that common sense and justice required should be deemed valid payments, and in this instance to correct the rigour of the bankrupt laws. Now if the defendant had given other goods in exchange for these at the time, that would have been a payment to all intents and purposes, though not made in monies numbered. And it has always been holden that giving a bill of exchange is deemed a payment in satisfaction, provided the bill be paid when due."

The other judges concurred. Postea to the defendant.

Wilkins v. Casey, 7 T. R. 711. 1798.

This case properly belongs to the 1 Jac. 1. c. 15, s. 14; it is payment to the bankrupt after a secret act; but it confirms the proposition that a payment by a bill, is the same as payment by money, if the bill is afterwards duly paid.

If then the bill of exchange was intended only for payment of goods sold in the course of trade, it was unnecessary to have mentioned it.

But the legislature probably had in contemplation two objects, viz. first, that it was hard that when goods were sold in the course of trade, and payment received in the course of trade, that that payment should be refunded; secondly, that it was hard that when a bill was regularly drawn and put into negotiation, the holder of it having regularly received payment, should after any length of time, or at least within six years, be called upon to pay back the sum he had received, because the person paying it had committed an unknown act of bankruptcy. This would be a great depreciation of paper credit.

A person who takes a regular bill of exchange, after having gone perhaps through fifty hands, is regardless what was the original consideration for drawing or accepting, if it were not usury or gaming, or something that nullifies the bill; but he would be much startled if he was told he must pay back what he receives upon the bill, perhaps some years afterwards, if the party paying at the time has committed a secret act of bankruptcy.

If the drawee accepts a regularly drawn bill of exchange in consideration of money he has borrowed of the drawer, or even for the accommodation of the drawer, and the bill is sent into the world, surely this statute was

before such commission issued; and all and every person or persons against whom, from and after the said twenty-

intended to protect the *bond fide* holder, though the acceptor had committed a secret act of bankruptcy at the time of payment. Bankers, who are in general the last holders of bills, would never be secure if they were to refund as often as they received payment under such circumstances. By the 46 Geo. 3. c. 135. s. 1, they would only now be liable to refund upon a commission issued against the party within two months after the payment.

But the bankrupt besides being the acceptor, may be either the drawer, or the negotiator, that is the indorser of a bill payable to order; and if payment is received of him before notice the payment is good; but this never can happen but when the bill has been previously dishonoured by the drawee or the acceptor: if therefore the holder using due diligence recovers the amount from an indorser or the drawer, the statute says, "he shall not refund to his assignees, though that indorser or drawer at the time is a secret bankrupt."

Though it is not usual (but it may be done) to arrest the acceptor of a bill on the day it is due before any prior application, yet it is according to usage of trade upon a dishonoured bill to compel payment immediately by legal coercion; which would induce me to join the majority of the judges in *Cox v. Morgan*, in thinking that when payment of a bill is obtained by legal coercion, it is not irreconcilable with the usual and ordinary course of trade.

I have thought it proper to suggest these reasons for the interpretation of this important statute.

Where the declarations of the legislature are clear, hardship and inconvenience can have no effect.

The case of *Ex parte Congalton*, 3 Bro. 47, decided by Lord Thurlow has been referred to this chapter frequently in citation; but as it contains a very important question, viz. What is the effect of money lent by a bankrupt after a secret act, but before notice, and paid back before notice, if a commission afterwards issues? I have reserved the consideration of it to the conclusion of this section.

Lord Thurlow has said in *Ex parte Congalton*, it is to be considered as if the money had never been lent; but

Bankrupts discharged from debts on policy of insurance.

ninth day of *October*, any commission of bankruptcy shall be awarded, shall be discharged of and from the

this I humbly conceive was advanced inadvertently or without a full consideration of the subject.

Mrs. Tyler, the bankrupt, had received 312*l.* from her nephew to invest in stock which she never did, and was therefore indebted in that sum, when the commission was sued out.

But after a secret act of bankruptcy, the nephew borrowed of her 163*l.* which he repaid, still without a knowledge of the act of bankruptcy.

The commissioners would *not* permit him to prove the whole of the 312*l.*, but thought the 163*l.* ought to be deducted, considering it payment under this statute.

Lord Thurlow ordered that he should prove the whole, observing that it was a loan and not payment, and that having been repaid, it was to be considered as if the money had never been lent.

If it was not a payment under this statute, the order was right that the whole original debt should be proved.

But I think it will not follow that it was the same as if the money had not been lent.

The money lent was the property of the assignees, and none but the assignees had a right to receive it back. In an action by the assignees he could have made no defence. Payment to a bankrupt protected by the 1 *Jac. c. 15. s. 14*, is payment after an act of bankruptcy of a debt existing prior to it.

If a bankrupt lends money after an act of bankruptcy, that must be recovered by the assignees, and the repayment is not protected by any statute. So much of the statute of 13 *Eliz.* is still unrepealed.

If the bankrupt were to borrow money and repay it after an act, without notice, the money paid may be recovered, by the assignees; that case also is not within any statute, qualifying the 13 *Eliz. c. 7*.

The bankrupt can buy and borrow, and his creditors will have the benefit of the goods and money he receives; but he cannot lend, nor repay a loan, nor even pay for goods if they are not within the description of this statute.

debt or debts owing by him, her, or them, on every such bond and policy of insurance as aforesaid, and shall have the benefit of the several statutes now in force against bankrupts, in like manner, to all intents and purposes, as if such loss or contingency had happened, and the money due in respect thereof had become payable before the time of the issuing of such commission. (2)

But every transaction in such cases is now valid, if a commission is not issued within two months, by 46 Geo. 3. c. 135, s. 1.

I conceive the following would have been the effect of the circumstances in *Congalton's* case, as the law then stood. Congalton must have proved the whole debt of 312*l*. The assignees might have recovered the 163*l*. in an action of assumpsit, and Mrs. Tyler would have been indebted to him what he paid back, notwithstanding she obtained her certificate.

If a commission now were to issue within two months after the money was borrowed, the law would be the same except that by the 46 Geo. 3, c. 135, s. 2, the money paid back, the 163*l*. might also be proved under the commission.

But if a trader after a secret act of bankruptcy lends a sum of money more than two months before the date of the commission, and receives payment back within the two months, then, by the 46 Geo. 3, c. 135, s. 1, the loan will have the same effect as if no prior act had been committed, and the repayment will be protected under the 1 Jac. c. 15, s. 14, and in that case it will be true that it is the same as if the loan had not been made.

(2) This section provides for two kinds of contracts which a bankrupt has entered into before his bankruptcy; and in consequence of which, a certain debt accrues by the occurrence of an event subsequent to the bankruptcy. The legislature therefore thought it was best for both the contracting parties, that one should prove that debt under the bankrupt's estate, and that the bankrupt having obtained his certificate, should be discharged from that debt.

This section, like the last, is extremely ill drawn; the contingency by which the obligor in a respondentia bond

Anno 24 Geo. 2. cap. 57. 1751.

Persons swear-
ing to a fictiti-
ous debt from a
bankrupt,

Sect. 9. AND whereas many abuses have been committed by bankrupts, and persons who, with their privity, have attempted to prove fictitious and pretended debts under commissions of bankruptcy, in order that such persons might be enabled to sign their consent to the certificates for discharging such bankrupts from their debts; for remedy whereof, and in order to prevent the like fraudulent and wicked practices for the future, be it enacted by the authority aforesaid, That where any persons shall fraudulently swear or depose, or being of the people called *quakers* affirm, before the major part of the commissioners named in such commission of bankruptcy, or by affidavit or affirmation exhibited to them, that a sum of money is due to him or her from any bankrupt or bankrupts, which shall in fact not be really and truly so due or owing; and shall, in respect of such fictitious

becomes liable, is the safe arrival of the ship, which is certainly very obscurely expressed.

The preamble speaks only of insurance of ships; but the enacting clause uses the words, *any policy of insurance*: it has therefore, been held not to be restrained by the preamble; but if a trader insures a life for a year, and the person dies within the year after the bankruptcy of the assurer, it may be proved under his commission. *Cox v. Liotard. Doug. 166.*

It would therefore apply also to an insurance by fire.

This is the first time that a *claim* is mentioned by the legislature; and sufficient of the bankrupt's property must be reserved to answer this claim till it is ascertained that the ship is lost in the case of a bottomry bond, or has arrived safe in the case of an insurance of a ship, or that the party is alive, in the case of an insurance upon a life.

In all these contracts the same sum may be proved as if the event had happened before the bankruptcy, and the same sum which could have been recovered in an action at law, if the trader had continued solvent.

and pretended debt, sign his or her consent to the certificate for such bankrupt's discharge from his debts; that in every such case, unless such bankrupt shall, before such time as the major part of the said commissioners shall have signed such certificate, by writing by him to be signed and delivered to one or more of the said commissioners, or to one or more of the assignees of his estate and effects, under such commission, disclose the said fraud, and object to the reality of such debt, such certificate shall be null and void to all intents and purposes, and such bankrupt shall not in that case be intitled to be discharged from his debts, or to have or receive any of the benefits or allowances given or allowed to bankrupts by the said act of the fifth year of his present majesty's reign; any thing therein contained to the contrary thereof, in any wise notwithstanding. (1)

and signing the certificate.

Unless the bankrupt shall disclose the fraud,

the certificate to be null, &c.

(1) The punishment of those who make a false proof of a debt is provided for by 5 Geo. 2. c. 30. s. 29.

This is intended to punish the bankrupt, when he is discovered to be an accomplice in so base a fraud.

In an action to which the defendant pleaded his bankruptcy, and the plaintiff attempted to invalidate the certificate by proving this species of fraud, Lord Kenyon held at nisi prius that the plaintiff must call the parties, who had made such false depositions. The plaintiff's counsel urged that it would be improper to call such witnesses, who must be perjured on one side or other; Lord Kenyon said, that that objection should lie in the mouth of the defendant, not of the plaintiff; and he thought they ought to be called, their testimony being certainly open to much observation.

One witness of that description was called, who established the fact of fraud; and the plaintiff had a verdict. *Edmonstone v. Webb*, 3 Esp. 264.

Ought not such a witness to be committed by the court, if any one would undertake to prosecute?

Letter of attorney from creditor in foreign parts, to authorize signing bankrupt's certificate.
Irish stat. sect. 67.

10. And it is hereby enacted, That where any creditor or creditors of any bankrupt reside in foreign parts, the letter of attorney of such creditor, attested by a notary public in the usual form, shall be a sufficient evidence of the power and authority by which any person thereby authorized shall sign any bankrupt's certificate; any thing in the said act of the fifth year of his present majesty's reign to the contrary thereof in any wise notwithstanding. (2)

4 Geo. 3. c. 23. 1764.

AN ACT FOR PREVENTING INCONVENIENCES ARISING IN CASES OF MERCHANTS, AND SUCH OTHER PERSONS AS ARE WITHIN THE DESCRIPTION OF THE STATUTES RELATING TO BANKRUPTS, BEING ENTITLED TO PRIVILEGE OF PARLIAMENT, AND BECOMING INSOLVENT.

“ WHEREAS merchants, bankers, brokers, factors, scriveners, and traders, within the description of the statutes relating to bankrupts, having privilege of parliament, are not compellable to pay their just debts, or to become bankrupts, by reason of the freedom of their persons from arrests upon civil process, and some doubts have also arisen, whether in cases of bankruptcy, a commission can be sued out during the continuance of such privilege; to remedy which inconveniences, and to support the honour and dignity of parliament, and good faith and credit in commercial dealings, which require that in such cases the laws should have their due course and that no such merchants, bankers, brokers, factors scriveners, or traders, in case of actual insolvency should

(2) By the 5 Geo. 2. c. 30. s. 10. any person may sign the certificate, who is *duly authorized thereunto*; one would therefore have thought that this section was unnecessary

by any privilege whatever be exempted from doing equal justice to all their creditors," be it enacted by the king's most excellent majesty, by and with the advice and consent of the lords spiritual and temporal, and commons, in this present parliament assembled, and it is hereby enacted, by the authority of the same, That from and after the eleventh day of May, one thousand seven hundred and sixty-four, it shall be lawful for any single creditor, or two or more creditors being partners, whose debt or debts shall amount to one hundred pounds or upwards, and for any two creditors whose debts shall amount to one hundred and fifty pounds or upwards, or any three or more creditors, whose debts shall amount to two hundred pounds or upwards, of any person or persons deemed a merchant, banker, broker, factor, scrivener, or trader or traders, within the description of the acts of parliament relating to bankrupts, having privilege of parliament, at any time, upon affidavit or affidavits being made and filed on record in any of his majesty's courts at Westminster, by such creditor or creditors, that such debt or debts is or are justly due to him or them respectively, and that every such debtor as he or they verily believe is a merchant, banker, broker, factor, scrivener, or trader, within the description of the statutes relating to bankrupts, to sue out of the same court, summons, or an original bill and summons against such merchant, banker, broker, factor, scrivener, or trader, and serve him with a copy thereof; and if such merchant, banker, factor, scrivener, or trader, shall not, within two months after personal service of such summons (affidavits of the debt or debts having been duly made and filed as aforesaid) pay, secure, or compound for such debt or debts, to the satisfaction of such creditor or creditors, or enter into a bond in such sum, and with two such sufficient sureties as any of the judges of that court, out of

From and after 11th May 1764 creditors of any merchant, &c. within the description of the laws relating to bankrupts, having privilege of parliament, may upon affidavits made of the debts and filed in any of the courts at Westminster,

sue out a summons, or original bill, &c. against such debtor,

and if he shall not, within two months, pay, secure, or compound for the debt,

he shall be adjudged a bankrupt, and a commission may be accordingly sued out against him.

which such summons shall issue, shall approve of, to pay such sum as shall be recovered in such action or actions, together with such costs as shall be given in the same, he shall be accounted and adjudged a bankrupt from the time of the service of such summons; and any creditor or creditors may sue out a commission against any such person, and proceed thereon in like manner as against other bankrupts. (1)

But this act is not to extend to such debts as were contracted before 8th March 1764.

2. Provided always, and it is hereby declared, That this act shall not extend, or be deemed or construed to extend to any such debt or debts as aforesaid, contracted before the eighth day of *March*, one thousand seven hundred and sixty-four, any thing hereinbefore contained to the contrary thereof, in any wise notwithstanding.

But any merchant, &c. committing an act of bankruptcy after the last day of this session, the creditors may sue out a commission against him.

3. And be it further enacted by the authority aforesaid, That if any merchant, banker, broker, factor, scrivener, or trader, shall after the last day of this session of parliament, commit any act of bankruptcy, that then and in such case any creditor or creditors as aforesaid, may sue out a commission of bankrupt against such

(1) All the acts of bankruptcy being voluntary acts, or acts which the trader may avoid, except one, viz. lying in gaol two months under an arrest, and members of parliament being privileged from arrest in civil suits, this statute became necessary to compel members of either house, being traders, to discharge their debts, or be subject to a commission of bankrupt.

The same person who compels the member of parliament to commit this act of bankruptcy, may sue out a commission upon it. See observations upon the inconvenience that a creditor cannot sue out a commission against his debtor, whom he has taken in execution, p. 218. *ante*.

By the Irish statute, 11 & 12 Geo. 3. c. 8. s. 1. all traders having privilege of parliament are made subject to the bankrupt law in Ireland in a more simple manner than by this statute.

merchant, banker, broker, scrivener, or trader, and the commissioners in such commission, and other persons may proceed thereon in like manner as against other bankrupts; any privilege of parliament to the contrary notwithstanding.

and the commissioners proceed therein as against other bankrupts notwithstanding his privilege.

4. Provided nevertheless, and be it enacted, That nothing in this act shall subject any person intitled to privilege of parliament, to be arrested or imprisoned during the time of such privilege, except in cases made felony by the acts relating to bankrupts, or any of them. (2)

Persons intitled to privilege not subject to arrest, &c. except in cases made felony.

(2) See further regulations upon the bankruptcy of traders having the privilege of parliament by the 45 Geo. 3. c. 124.

By the 19 & 20 Geo. 3. c. 25. s. 9. Irish statutes, if a commission of bankrupt issues against any member of the house of commons, the commissioners must certify to the speaker of the house at the expiration of six months after the commission is issued that the bankrupt's creditors are not fully satisfied, and that the commission is not superseded, if the facts are so; and thereupon the speaker shall declare his seat vacant, and shall issue a writ for the election of a member in the place of the bankrupt.

A bill to make a similar law respecting the members of parliament for England, is now introduced into the house of commons.

ERRATA ET ADDENDA.

- Page 13, notes, line 11, for interests, read interest.
 14, note, line 2, for 1801, read 1811.
 49, note, last line, for Bolden, read Bolton.
 53, text, line 1, for goods, read good.
 81, place (2) at the end of section 3.
 131, note, line 24, after M'Williams, add 1 Sch. & Lef. 169.
 134, note, line 19, for forty-second, read forty-two.
 151, note, line 29, for signifies, read signify.
 157, note, line 19, after creditors, add fairly.
 184, note, line 12, for proposed, read prepared.
 190, note, line 8, after C. J. add 2 Str. 794.
 line 29, after Bernal add, 11 Ves. 557.
 203, note, line 7, for repeated, read repealed.
 208, note, line 2, after exist, place ?
 212, note, line 17, for has, read have.
 213, note, line 20, for commission, read omission.
 line 21, for omission, read commission.
 220, note, line 20, for bankrupt, read debtor.
 223, note, line 8, for defend, read offend.
 234, note, line 24, after and, add several.
 235, note, line 33, for partnership, read separate.
 240, note, line 9, for petitioner's, read petitioning.
 246, note, line 31, for petitioner, read petitioning.
 32, for otha, read other.
 294, note, line 35, for on, read or.
 307, note, line 21, for v. read and.
 315, note, line 37, after only, add be.
 328, note, line 29, for is, read as.
 334, note, line 34, for Wills, read Wells.

N.B. The second volume will contain all the Irish and the remaining English Bankrupt Statutes, the General Orders of the Chancellor, to which will be subjoined Notes, referring to every material decision in Bankruptcy, which is not taken notice of in the present volume; to these will be added the most useful precedents, and a copious Index to the whole.

The two volumes are intended to form a Complete System to the Bankrupt Law, including both Theory and Practice.

43

1

